

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

JOINT APPENDIX

IN THE
United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15.066

SUMNER G. WHITTIER, ADMINISTRATOR OF
VETERANS AFFAIRS, ET AL., *Appellants*

v.

HERMAN L. R. EMMET, JR., On Behalf of Himself
and all Others Similarly Situated, *Appellee*

No. 15.067

UNITED STATES OF AMERICA, *Appellant*

v.

JAMES A. DEERING, On Behalf of Himself and
all Others Similarly Situated, *Appellee*

No. 15.068

UNITED STATES OF AMERICA, *Appellant*

v.

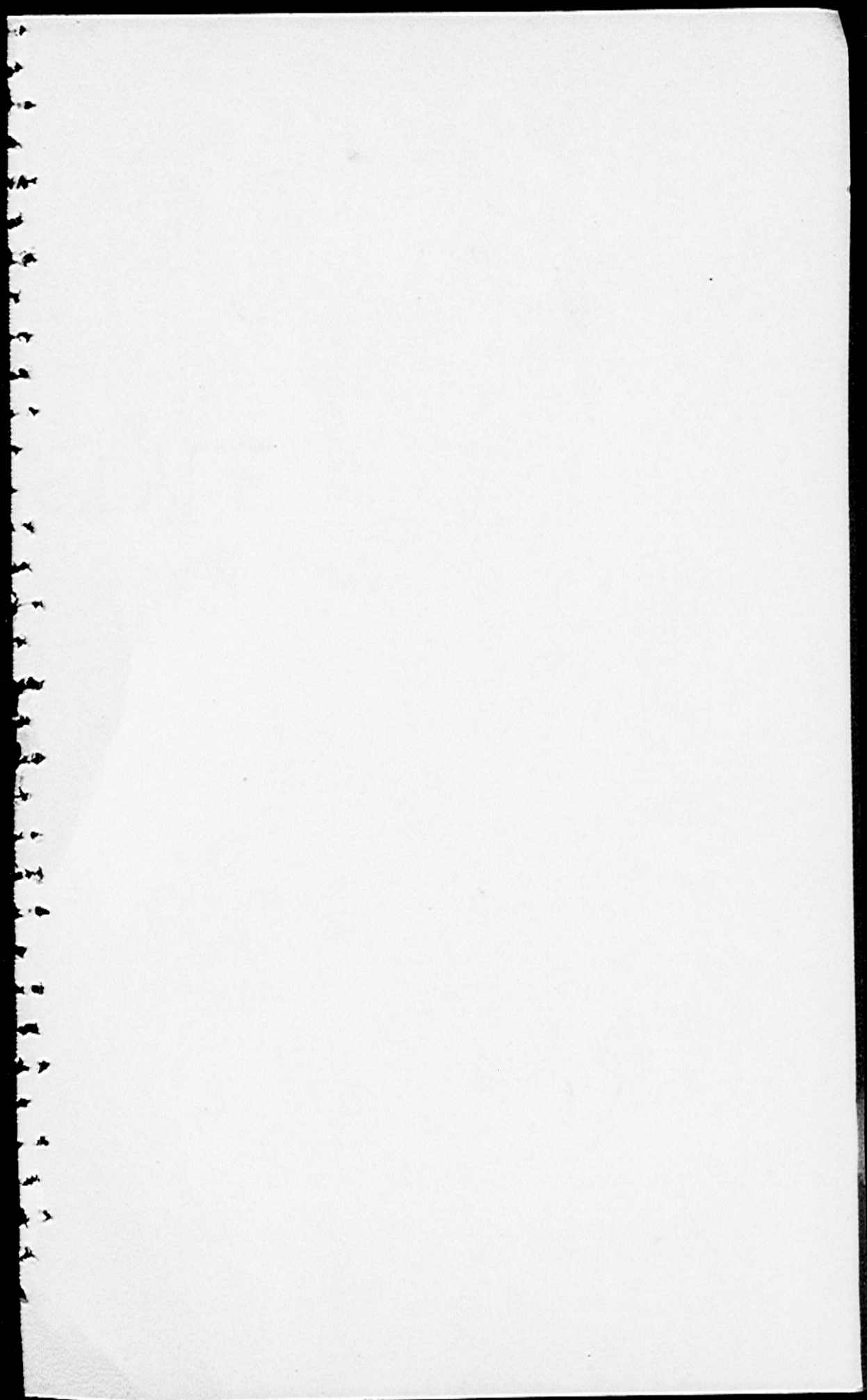
ROBERT H. MABBUTT, ET AL., Suing for Themselves
and all Persons Similarly Situated, *Appellees*

On Appeal From the United States District Court for the
District of Columbia
United States Court of Appeals
For the
District of Columbia Circuit

FILED JUN 29 1959

FRANK OF BYRON S. ADAMS, WASHINGTON, D. C.

CLERK



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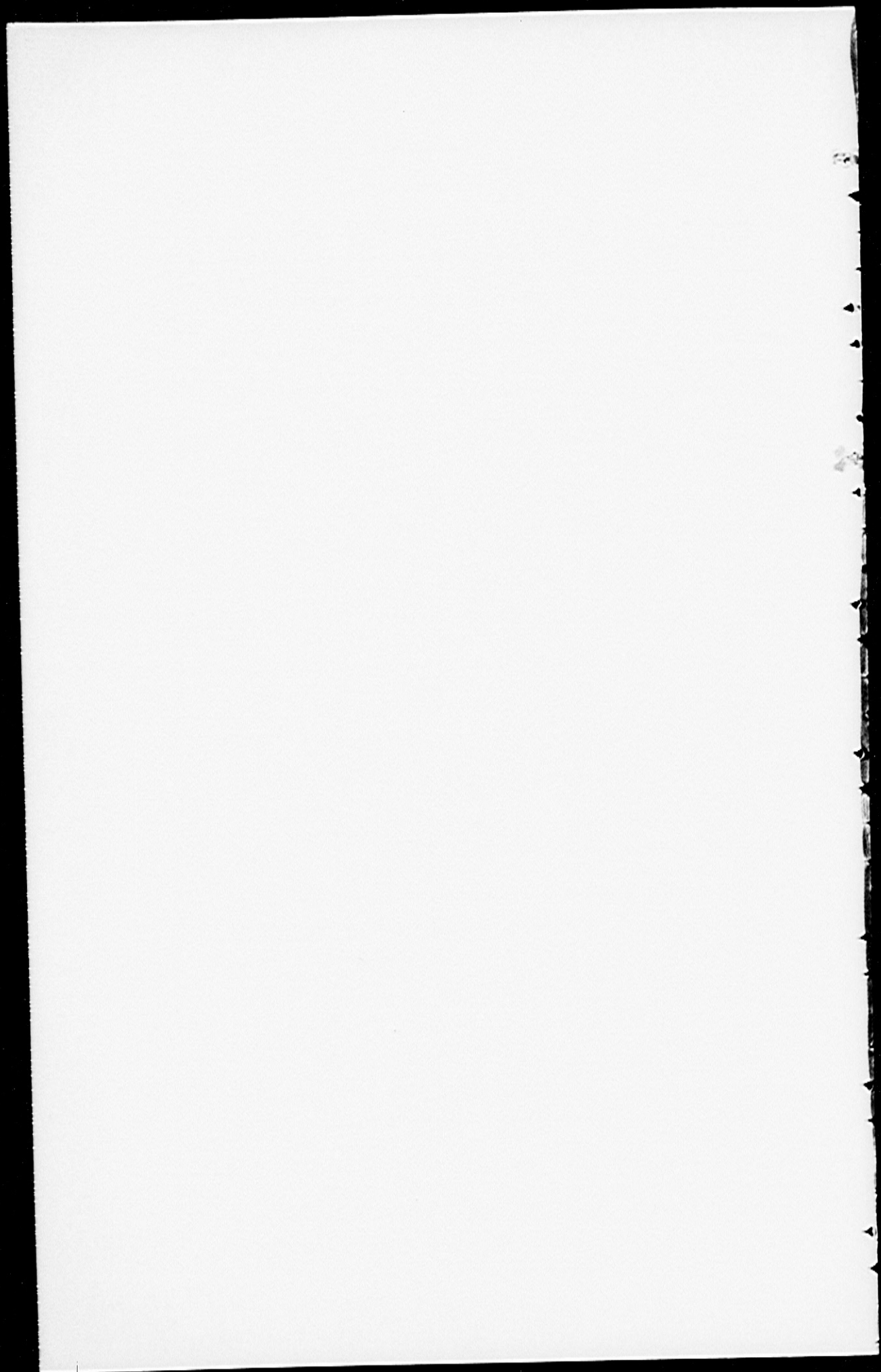
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IN THE
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FOR THE DISTRICT OF COLUMBIA CIRCUIT

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On Appeal From the United States District Court for the
District of Columbia

JOINT APPENDIX

**RECORD IN EMMET, NO. 15,066 AND THE CONSOLIDATED
PROCEEDINGS BELOW**

Docket Entries

1955 Deposit for cost. filed

Dec. 30 Complaint, appearance.

Dec. 30 Summons, copies (4) and copies (4) of Complaints issued.

Dec. 30 Motion of Willard Van Valkenburgh to intervene as party Pltff. Deposit of \$5.00 by Henry F. Butler. filed

1956

Jan. 6 Exhibit in support of motion to intervene. filed

Jan. 9 Order granting Willard Van Valkenburgh leave to intervene.

McLaughlin, J. (N)

Jan. 17 Petition in Intervention, c/m 1-13-56. filed

Jan. 24 Motion of Alfred S. Moses, Jr. for leave to intervene, Exhibit. App. Butler, Koehler & Tausig. Deposit \$5.00 by Henry F. Butler. filed

Jan. 27 Order granting leave to Alfred S. Moses, Jr. to intervene.

McLaughlin, J. (N)

Feb. 1 Petition of Intervention of Alfred S. Moses, Jr. c/m 1-27-56. filed

Mar. 2 Answer of defts. to complt. c/m 2-29-56. app. Leo A. Rover, Frank H. Strickler & Catherine B. Kelly. filed

Mar. 10 Answer of defts. to intervening complt. of Willard Van Valkenburgh. filed.

Mar. 23 Answer of defts. to petition in intervention of Alfred S. Moses, Jr. c/m 3-23-56. filed

Mar. 23 Calendared (N)

Nov. 13 Motion of Paul E. Plesha, James E. Mabbutt, Robert H. Mabbutt, Robert R. Johnson to intervene & Exhibit. App. of Butler, Koehler & Tausig.

Nov. 13 Deposit for costs by Butler. \$5.00.

Nov. 20 Order granting leave to Paul E. Plesha, James E. Marbutt, Robert H. Marbutt & Robert R. Johnson to intervene & file petition in intervention. Matthews, J. (N)

Nov. 21 Petition in intervention, c/m 11-21-56, app. Butler, Kohler & Tausig, (Lawrence A. Schir 503 Bank Of America Bldg., Sacramento, Calif.). filed

Dec. 7 Motion of Herman Hormel, Jr., Charles A. Deering to intervene, Exhibit. App. Butler, Koehler & Taussig filed

Deposit by Butler, \$5.00

Dec. 11 Order granting Herman Hormel, Jr., Charles H. Stilson, Jr., and James A. Deering leave to intervene as co-Pltffs. Matthews, J. (N)

Dec. 13 Petition in intervention of Herman Hormel, Jr. & Charles H. Stilson, Jr. & James A. Deering, c/m 12-11-56. filed

1957

Aug. 1 Motion of pltffs. for judgment & determination of sum of taxable costs, litigation expenses & fees to be paid; P&A, c/m 8-1-57. M.C. 8-1-57. filed

Aug. 6 Request by Pltff. for admission of facts, c/s 8-6-57, filed

Aug. 6 Interrogatories of Pltff. to Deft. #1, c/s 8-6-57, filed

Aug. 21 Answer of Defts. to petition in intervention of intervenor Johnson, c/m 8-21-57, filed

Aug. 21 Answer of Defts. to petition in intervention of intervenor R. H. Mabbut, c/m 8-21-57, filed

Aug. 21 Answer of Defts. to petition in intervention of intervenor J. E. Mabbut, c/m 8-21-57, filed

Aug. 21 Answer of Defts. to petition in intervention of intervenor Harmel, c/m 8-21-57, filed

Aug. 21 Answer of Defts. to petition in intervention of intervenor Deering, c/m 8-21-57, filed

Aug. 21 Answer of Defts. to petition in intervention of intervenor Plesha, c/m 8-21-57, filed

- Aug. 21 Answer of Defts. to petition in intervention of intervenor Stilson, c/m 8-21-57, filed
- Aug. 22 Motion of Defts. to strike Interrogs. propounded to Defts. under Rule 33, c/m 8-22-57 M.C. 8-22-57, filed
- Aug. 22 Opposition of Deft. to motion of Pltffs. & intervenors for judgment for mandatory relief, etc. & atty's fees, c/m 8-22-57, M.C. 8-22-57, filed
- Aug. 22 Objection of Defts. to requests for admission of facts, c/m 8-22-57, M.C. 8-22-57, filed
- Aug. 27 Supplemental P&A of Pltff. & intervenors re: liability of United States for interest, filed
- Aug. 27 Points & Authorities of Pltff. in reply to Deft's opposition to motion for judgment for mandatory relief, etc., filed
- Aug. 27 Affidavits (3) of Schei, Redford & Tausig in support of motion for attorneys fees, filed
- Aug. 27 Affidavit of Lawrence A. Schei in support of motion for determination of taxable costs, etc., filed
- Aug. 27 Certificate of service of motions, etc., filed
- Aug. 28 Consent order substituting Robert B. Anderson, Secretary of the Treasury as a party deft. for George M. Humphrey, Curran, J. (N) micro. 8-29-57
- Sep. 7 Opposition of defts. to pltffs. motion for judgment construed in open court to be pltffs. motion for summary judgment; c/m 9-7-57; affidavit; exhibit; P&A, M.C. 9-7-57. filed
- Sep. 9 Plaintiff intervenors' memo of P&A's in support of demand of Hormel, Stilson and Deering for litigation expenses, c/s 9-9-57. filed
- Sep. 9 Affidavit of John G. Taussig.
- Sep. 12 Reply of pltff to deft's opposition to motion for judgment etc. c/s 9-12-57. filed
- Sep. 20 Supplemental memorandum of defts; app. E. Riley Casey, & Robert J. Asman, Ass't U.S. Atty's; c/m 9-20-57. filed
- Oct. 3 Amended Answer (Fiat) Sirica, J.

Dec. 23 Consent order substituting Sumner G. Whittier, Administrator of Veterans Affairs as party deft. for Harvey V. Higley. Curran, J.

1958

Jan. 9 Order denying plttf. motion for summary judgment. (signed 1-8-58) Curran, J. (N)

Jan. 24 Motion to strike interrogatories and objections to requests for admission argued and submitted. (Rep: B. O. Watson) Keech, J.

Jan. 28 Order granting deft's motion to strike interrogatories, Keech, J. (N)

Jan. 28 Order declaring requests for admissions filed herein Aug. 6, 1957, and deft's objections thereto as moot. Keech, J. (N)

Mar. 8 Transcript of proceedings, 1-24-58. (Court) filed

Apr. 24 Motion of plttf. to consolidate 5658-55, 1032-58 and 1018-58 for pre-trial and trial; c/s 4-24-58 P&A M.S. 4-24-58. filed

Apr. 30 Opposition of defts. to motion to consolidate c/m 4-30-58 P&A filed

May 28 Order consolidating 5658-55, 1032-58, and 1018-58 for pretrial and trial (N) Curran, J.

June 19 Supplemental affidavit of John Geyer Tausig in support of motion for determination of atty's. fees, schedule A, B, & C c/m 6-19-58. filed

June 19 Supplemental affidavit of John G. Tausig of disbursements, c/m 6-19-58. filed

June 19 Affidavit of Lawrence A. Schei relative to legal services & costs Exhibit "A" filed

June 19 Supplemental affidavit of Nathaniel F. Bedford of services & disbursements of attorneys filed

June 19 Certificate of service of pleadings filed 6-19-58 served personally 6-19-58. filed

June 20 Pre-Trial Proceedings Letts, J.

June 20 Certificate of Readiness (N/AC) filed

June 25 Transcript of proceedings Vol. I pg. 1-13 (Reporter-D. Sweet) filed

- Aug. 5 Motion of plttf. for Temporary Restraining Order, Affidavit, P&A "Let this be set for hearing on Monday Aug. 11, 1958 at 10:00 A.M." Youngdahl, J. filed
- Aug. 11 Motion for temporary restraining order treated as motion for preliminary injunction, argued and submitted (Rep. H. Kaitz) Youngdahl, J.
- Aug. 15 Opposition of defts. to motion for temporary restraining order; Exhibit, Affidavit filed
- Aug. 15 Memorandum-Findings of fact and conclusions of law granting plttfs. motion for temporary injunction (Original filed in 1032-58) Youngdahl, J. (N)
- Aug. 19 Order for preliminary injunction (N) Youngdahl, J. (Original filed in CA 1032-58)
- Aug. 22 Order for security \$3000 bond. (Original filed in 1032-58) Youngdahl, J.
- Sept. 10 Injunction undertaking of plttf's attys. in amount of \$3,000.00 with Fidelity & Deposit Co. of Md. approved (filed in CA1032-58)
- Oct. 15 Trial Brief of defts., c/m 10-15-58 filed
- Oct. 20 Second supplemental affidavit of disbursements, c/m 10-20-58 filed
- Oct. 20 Second supplemental affidavit of John Geyer Tausig in support of motion for fees & Schedule A, B, & C filed
- Oct. 20 Hearing begun; respited til 10-21-58 (Reporter-T. O'Neal) Boldt, J.
- Oct. 21 Hearing resumed; respited til 10-22-58 (Reporter-T. O'Neal) Boldt, J.
- Oct. 22 Hearing resumed; finding for plttfs; (order to be presented) (Reporter-Thomas O'Neal) Boldt, J.
- Nov. 7 Findings of fact and conclusions of law (N) Boldt, J.
- Nov. 7 Judgment for plttfs. vs. defts. for insurance and for attys. fees. Micro 11-10-58 Boldt, J.
- 1959
- Jan. 5 Notice of appeal of deft., copy mailed to Butler, Koehler & Tausig filed

Complaint. Filed December 30, 1955

Plaintiff, as and for his complaint herein, alleges:

1. Plaintiff Herman L. R. Emmet, Jr. is a citizen of the United States, a resident of the District of Columbia, residing at 1830 Twenty-Fourth Street, Northwest, Washington, D. C., is over 21 years of age and is under no disability to bring this action. Defendant Harvey V. Higley is the Administrator of Veterans Affairs of the United States, Defendant George Magoffin Humphrey is Secretary of the Treasury of the United States, Defendant Ivy Baker Priest is the Treasurer of the United States, and Defendant Joseph Campbell is Comptroller General of the United States.

2. Jurisdiction is founded on the provisions of Title 38, United States Code, Sections 445 and 817; Title 28, United States Code, Sections 1346(a)(2) and 1402(a); Title 5, United States Code, Section 1009; and Rule 23, Federal Rules of Civil Procedure.

3. Plaintiff brings this action on behalf of himself and all other persons who are or have been members of the Armed Forces of the United States, whose lives were insured under a policy or policies of the National Service Life Insurance issued under the terms and provisions of Title 38, United States Code, Sections 801 to 818, inclusive, whose lives also were insured under or who were the owners or holders of, or had an interest in a policy or policies of commercial life insurance protected against lapse under the terms and provisions of the original Article IV of the Soldiers' and Sailors' Civil Relief Act of 1940 (Act of Oct. 17, 1940, c. 888 Secs. 400-415; 54 Stat. 1183; Title 50 Appendix, United States Code, Secs. 540 to 554, inclusive), and against whose National Service Life Insurance dividends the Veterans Administration has set off any sums alleged to be due to the United States as a personal liability on account of the payment by the United States of any amounts alleged to be due upon termination

of protection and lapse of any of said policies of commercial life insurance of said persons, which said policies were protected against lapse under the terms and provisions of said Article IV of said Soldiers' and Sailors' Civil Relief Act of 1940, similarly situated. The said persons similarly situated number, on information and belief, several thousand, the exact number being unknown to plaintiff, and it is therefore impracticable to bring them all before the Court. There are common questions of law and fact affecting the several rights of said persons as a class, and a common relief is sought.

4. Plaintiff Emmet is the owner of National Service Life Insurance Policy No. N-2066975 issued to him on or about May, 1942, effective on or about April 1942, on which policy he has paid all premiums and which has since been in full force and effect until termination of the term thereof.

5. Plaintiff Emmet, for more than one month prior to his induction in the Army of the United States on or about January 27, 1941, was the owner of Life Insurance Policy No. 17,800,895, issued by the New York Life Insurance Company, which policy, upon application by plaintiff Emmet to said New York Life Insurance Company on Veterans Administration Insurance Form 380 was, upon approval by the Veterans Administration, protected against lapse for nonpayment of premiums by plaintiff under the terms and provisions of said Article IV of said Soldiers' and Sailors' Civil Relief Act of 1940. Plaintiff Emmet's tour of duty with the Armed Services of the United States terminated on or about March 4, 1944.

6. Pursuant to an announcement by Veterans Administration that a special dividend, known as the "1948 Special Dividend," had been declared on policies of National Service Life Insurance, plaintiff Emmet duly filed an application for said special dividend and in due course of events was advised by the Veterans Administration that he was entitled to a dividend in the amount of \$337.60, but

that the Veterans Administration had set off against said dividend an alleged indebtedness to the United States in the amount of \$543.20, which indebtedness was allegedly incurred through the lapsing of plaintiff's aforesaid policy of commercial life insurance and the payment by the United States of the amount certified by the Veterans Administration to be due the aforesaid New York Life Insurance Company as an award under Section 406 of Article IV of the Soldiers' and Sailors' Civil Relief Act, as amended October 16, 1942, (Title 50 Appendix United States Code, Sec. 546) on account of protection against lapse of the aforesaid insurance policy issued by the New York Life Insurance Company. Commencing May 1, 1951, the Veterans Administration further withheld disability compensation payments duly awarded said plaintiff Emmet in the amount of \$15.00 per month until a total amount of \$205.60 had been withheld on account of the alleged balance due on the alleged indebtedness as aforesaid. On information and belief, others similarly situated were similarly treated by the withholding of some or all of the "1948 Special Dividend" and of disability compensation or subsequent dividends on National Service Life Insurance Policies.

7. Pursuant to the provisions of Title 50 Appendix, United States Code, Sec. 546, as amended April 3, 1948, the funds so withheld from plaintiff by the Veterans Administration were credited to the appropriation for the payment of claims under Article IV of the Soldiers' and Sailors' Civil Relief Act, as amended October 6, 1942, and on information and belief the funds similarly withheld from all others similarly situated to plaintiff were likewise dealt with, all of which said funds are now under the control of Ivy Baker Priest, Treasurer of the United States.

8. Plaintiff alleges that the protection afforded his policy of commercial life insurance, and the policies of other members of the class of persons similarly situated, was pursuant to and under the clear terms and provisions of

Article IV of the Soldiers' and Sailors' Civil Relief Act as originally enacted, and that under said terms and provisions neither plaintiff nor any member of the class for which he brings this action was or is personally indebted to the United States on account of any payment by the United States to any life insurance company for the protection against lapse under said Act of 1940 of any of the said commercial life insurance policies, that the moneys of plaintiff and other members of the class of those similarly situated withheld by the Veterans Administration and credited to the payment of claims under Article IV of the Soldiers' and Sailors' Civil Relief Act, as amended October 6, 1942, have been unlawfully withheld and credited, and that from said fund plaintiff is entitled to \$543.20, and other members of the class are entitled to the amounts withheld from their respective National Service Life Insurance dividends and disability compensation payments or obtained from them by misrepresentation of the extent of their liabilities under Article IV of the Soldiers' and Sailors' Civil Relief Act of 1940.

9. Plaintiff further alleges that he and, on information and belief, others similarly situated, relied implicitly on the plain language and meaning of the Soldiers' and Sailors' Civil Relief Act of 1940 (Act of Oct. 17, 1940; 54 Stat. 1185), on the wording of Veterans Administration Insurance Forms 380 and 385, on the statements promulgated by officials of the Veterans Administration purporting to interpret said Act of which plaintiff had knowledge prior to applying for the benefits of said Act, on the acts of commission, omission and equivocation and on the representations and general conduct of the Veterans Administration and its officials which, prior to the time plaintiff permitted his policy of commercial insurance to lapse in reliance thereon, were all inconsistent with or misleading as to the claim subsequently asserted against plaintiff, whereby plaintiff would be damaged by permitting the Veterans Administration to continue its present interpretation of

said Act, and the Veterans Administration should be estopped by its inconsistent and misleading course of conduct from so doing.

10. Plaintiff further alleges on information and belief that in many instances among members of the class of persons similarly situated where the National Service Life Insurance dividends were not as much as the amounts alleged by the Veterans Administration to be due from them to the United States under its interpretation of the Soldiers' and Sailors' Civil Relief Act of 1940, such persons have been subjected to demands from the General Accounting Office and Joseph Campbell, as Comptroller General, for payment of the alleged balances due, and have been threatened with litigation to recover said alleged balances, that legal actions actually have been commenced against some of them and a multiplicity of actions will result unless this Court construes the Soldiers' and Sailors' Civil Relief Act of 1940 and enjoins the defendants from acting under their present misinterpretation of the said Soldiers' and Sailors' Civil Relief Act of 1940.

11. Plaintiff further alleges that, even if the United States should be entitled to reimbursement from him and others similarly situated under the terms and provisions of the original Article IV of the Soldiers' and Sailors' Civil Relief Act of 1940, which plaintiff denies, nevertheless plaintiff and other members of the class of persons similarly situated have been overcharged for the protection afforded and their rights under the Fifth Amendment to the Constitution of the United States infringed by deprivation of their property without due process of law or just compensation, by taking from plaintiff and others of the class amounts equal to the amounts paid to the commercial insurance companies pursuant to the provisions of the 1942 Amendments to said Article IV (Act of Oct. 6, 1942; 56 Stat. 773), *with interest at 5% or more compounded annually*, instead of an amount equal to the amount payable by

the United States as indemnitor to the commercial insurance companies pursuant to the original Soldiers' and Sailors' Civil Relief Act of 1940 (Act of Oct. 17, 1940; 54 Stat. 1183) with 3% *simple interest*.

12. Plaintiff Emmet has in writing protested to the Veterans Administration against these unauthorized offsets but the Veterans Administration and Harvey V. Higley as Administrator of Veterans Affairs and Joseph Campbell as Comptroller General have continued this unlawful conduct, have refused to pay or authorize payment to plaintiff the funds lawfully due him, have alleged that the determination of the Veterans Administration is final and that plaintiff is without legal remedy and, on information and belief, have likewise dealt with other members of the class to which plaintiff belongs.

13. Plaintiff Emmet and other members of the class of persons similarly situated will be irreparably damaged and a multiplicity of litigation will ensue unless this Court grants the relief prayed for herein.

WHEREFORE, plaintiff demands:

1. That the Court issue a permanent injunction preventing and restraining the defendants and each of them from continuing any construction of the terms and provisions of the Soldiers' and Sailors' Civil Relief Act of 1940 (Act of Oct. 17, 1940, c. 888 Secs. 400-415; 54 Stat. 1183) which asserts personal liability, over and above the capital value of their respective policies of Commercial Life Insurance protected pursuant to said Act, from plaintiff and other members of the class of persons similarly situated due the United States for payments made by the United States to said Commercial Life Insurance companies in settlement of the liabilities of the United States arising under the original Soldiers' and Sailors' Civil Relief Act of 1940, and from making further demands upon, threatening litigation against, or commencing further litigation against plaintiff or any member of the class of persons similarly situated.

2. That the Court order the Administrator of Veterans Affairs to account for all funds withheld or obtained from plaintiff and other members of the class of persons similarly situated on the basis of an asserted personal liability under the provisions of the original Soldiers' and Sailors' Civil Relief Act of 1940, over and above the capital values of his and their respective protected policies of commercial life insurance at the time said policies lapsed.

3. That the Court impress a trust for the benefit of plaintiff and other members of the class of persons similarly situated upon so much of said funds credited to the appropriation for the payment of claims under Article IV of the Soldiers' and Sailors' Civil Relief Act, as amended October 16, 1942, as were obtained and credited to said appropriation pursuant to the present construction given the original Article IV of the Soldiers' and Sailors' Civil Relief Act of 1940 by the Administrator of Veterans Affairs from any source other than the capital values of protected policies of commercial life insurance.

4. That the Court issue a mandatory injunction enjoining the defendants, and each of them, from further refusing or failing to take such steps as may be necessary to pay out from said fund and distribute to plaintiff and other members of the class of persons similarly situated amounts equal to their respective National Service Life Insurance dividends and/or other funds withheld or obtained from them on the sole basis of an asserted personal liability under the aforesaid Soldiers' and Sailors' Civil Relief Act of 1940, and directing the defendants forthwith to make such payments.

5. That the Court issue Writs of Mandamus directed to the defendants, ordering them to perform the ministerial acts and functions of their respective offices, to carry out their statutory and lawful duties in administering the provisions relating to National Service Life Insurance, especially the payment of dividends when declared and due

thereunder without unlawful and illegal withholdings or setoffs, and the payment of disability compensation when declared payable to plaintiff and all other persons similarly situated.

6. That the Court order the defendants to notify all members of the class of persons similarly situated to plaintiff herein of the amounts withheld or collected as sums allegedly due from them to the United States as personal liabilities on account of payments by the United States of amounts alleged to be due upon termination of protection and lapse of policies of commercial life insurance of said persons, which said policies were protected against lapse under the terms and provisions of Article IV of the Soldiers' and Sailors' Civil Relief Act of 1940; or otherwise to make known the names and addresses of such other persons similarly situated in order that they may be apprised of their rights herein, as the Court shall direct.

7. That this Honorable Court grant to this plaintiff and other members of the class of persons similarly situated such other and further relief as shall seem meet, just and proper.

/s/ Herman L. R. Emmet, Jr.
HERMAN L. R. EMMET, JR.

BUTLER, KOEHLER & TAUSIG
By /s/ Henry F. Butler

Attorneys for Plaintiff
1039 Investment Building
Washington 5, D. C.

Order Granting Van Valkenburgh Leave to Intervene.
McLaughlin, J., Filed January 9, 1956

Upon consideration of the Motion for Leave to Intervene filed herein by Willard Van Valkenburgh and the proposed Petition in Intervention attached to said Motion, it is on this 9th day of January, 1956,

ORDERED, ADJUDGED, and DECREED:

1. That Willard Van Valkenburgh, a member of a class of persons as described in Rule 23(a) of Federal Rules of Civil Procedure for which class the plaintiff herein, Herman R. Emmet, Jr., seeks to enforce a right, is hereby given leave to intervene in this action and to file his Petition in Intervention, copy of which is attached to the Motion for Leave to Intervene, in order to more fully insure the adequate representation of all members of said class.

CHARLES F. McLAUGHLIN,
Judge.

Petition in Intervention of Van Valkenburgh.
Filed January 17, 1956

Intervenor, Willard Van Valkenburgh, by leave of Court first had and obtained, as and for his Petition in Intervention, alleges:

1. Intervenor Van Valkenburgh is a citizen of the United States, a resident of the Commonwealth of Virginia, residing at 1673 Preston Road, Alexandria, Virginia, is over 21 years of age and is under no disability to bring this action. Defendant Harvey V. Higley is the Administrator of Veterans Affairs of the United States, Defendant George Magoffin Humphrey is Secretary of the Treasury of the United States, Defendant Ivy Baker Priest is the Treasurer of the United States, and Defendant Joseph Campbell is Comptroller General of the United States.

2. Jurisdiction to intervene is founded on Rules 23 and 24, Federal Rules of Civil Procedure. Jurisdiction of the substantive issues involved in the primary action is founded upon provisions set forth in the Complaint heretofore filed by Herman L. R. Emmet, Jr., which intervenor adopts.

3. Intervenor Van Valkenburgh hereby adopts all of the general allegations set forth in paragraphs 3, 7, 8, 9, 10, 11 and 13 in the Complaint heretofore filed in this case by

Herman L. R. Emmet, Jr. and incorporates them herein by reference as fully as though set forth herein at length.

4. Intervenor Van Valkenburgh is the owner of National Service Life Insurance Policy No. N-5400-1055 issued to him, and effective on or about September 26, 1947, on which policy he has paid all premiums as they became due, and which presently is in full force and effect.

5. Intervenor Van Valkenburgh for more than one month prior to his induction into the Army of the United States on or about February 12, 1941, was the owner of Life Insurance Policy No. 17-797-163 issued to him by the New York Life Insurance Company on January 11, 1941, which, upon application by intervenor Van Valkenburgh to said New York Life Insurance Company on the appropriate Veterans Administration Insurance form which he believes was designated as Form 380 and approval thereof by the Veterans Administration, was protected against lapse for non-payment of premium by intervenor under the terms and provisions of Article IV of the Soldiers' and Sailors' Civil Relief Act of 1940. Intervenor's tour of duty with the armed services of the United States terminated on or about May 29, 1946.

6. Pursuant to an announcement by Veterans Administration that a special dividend, known as the "1948 Special Dividend," had been declared on policies of National Service Life Insurance, intervenor Van Valkenburgh duly filed an application for said special dividend and in due course of events was advised by the Veterans Administration that he was entitled to a dividend in the amount of \$236.00, but that the Veterans Administration had set off against said dividend an alleged indebtedness to the United States in the amount of \$467.76, which indebtedness was allegedly incurred through the lapsing of intervenor's aforesaid policy of commercial life insurance and the payment by the United States of the amount certified by the Veterans Administration to be due the aforesaid New

York Life Insurance Company as an award under Section 406 of Article IV of the Soldiers' and Sailors' Civil Relief Act, as amended October 16, 1942, (Title 50 Appendix United States Code, Sec. 546) on account of protection against lapse of the aforesaid insurance policy issued by the New York Life Insurance Company, leaving a balance alleged to be due from intervenor Van Valkenburgh to the United States of \$231.76 for payment of which defendants have made demands upon intervenor Van Valkenburgh, and threaten him with suit to compel such payment.

WHEREFORE, intervenor demands:

1. That he and all other members of the class of persons similarly situated to him be joined as party plaintiffs with Herman L. R. Emmet, Jr. for the prosecution of the relief sought herein.

2. That the Court issue a permanent injunction preventing and restraining the defendants and each of them from continuing any construction of the terms and provisions of the Soldiers' and Sailors' Civil Relief Act of 1940 (Act of Oct. 17, 1940, c. 888 Secs. 400-415; 54 Stat. 1183) which asserts personal liability, over and above the capital value of their respective policies of Commercial Life Insurance protected pursuant to said Act, from intervenor and other members of the class of persons similarly situated due the United States for payments made by the United States to said Commercial Life Insurance companies in settlement of the liabilities of the United States arising under the original Soldiers' and Sailors' Civil Relief Act of 1940, and from making further demands upon, threatening litigation against, or commencing further litigation against intervenor or any member of the class of persons similarly situated.

3. That the Court order the Administrator of Veterans Affairs to account for all funds withheld or obtained from intervenor and other members of the class of persons similarly situated on the basis of an asserted personal liability

under the provisions of the original Soldiers' and Sailors' Civil Relief Act of 1940, over and above the capital values of his and their respective protected policies of commercial life insurance at the time said policies lapsed.

4. That the Court impress a trust for the benefit of intervenor and other members of the class of persons similarly situated upon so much of said funds credited to the appropriation for the payment of claims under Article IV of the Soldiers' and Sailors' Civil Relief Act, as amended October 16, 1942, as were obtained and credited to said appropriation pursuant to the present construction given the original Article IV of the Soldiers' and Sailors' Civil Relief Act of 1940 by the Administrator of Veterans Affairs from any source other than the capital values of protected policies of commercial life insurance.

5. That the Court issue a mandatory injunction enjoining the defendants, and each of them, from further refusing or failing to take such steps as may be necessary to pay out from said fund and distribute to intervenor and other members of the class of persons similarly situated amounts equal to their respective National Service Life Insurance dividends and/or other funds withheld or obtained from them on the sole basis of an asserted personal liability under the aforesaid Soldiers' and Sailors' Civil Relief Act of 1940, and directing the defendants forthwith to make such payments.

6. That the Court issue Writs of Mandamus directed to the defendants, ordering them to perform the ministerial acts and functions of their respective offices, to carry out their statutory and lawful duties in administering the provisions relating to National Service Life Insurance, especially the payment of dividends when declared and due thereunder without unlawful and illegal withholdings or setoffs, and the payment of disability compensation when declared payable to intervenor and all other persons similarly situated.

7. That this Honorable Court grant to this intervenor and other members of the class of persons similarly situated such other and further relief as shall seem meet, just and proper.

Willard Van Valkenburgh
WILLARD VAN VALKENBURGH

BUTLER, KOEHLER & TAUSIG
By Henry F. Butler

Attorneys for Intervenor
1039 Investment Building
Washington 5, D. C.

**Order Granting Moses Leave to Intervene.
McLaughlin, J., Filed January 27, 1956**

Upon consideration of the Motion for Leave to Intervene filed herein by Alfred S. Moses, Jr. and the proposed Petition in Intervention attached to said Motion, it is on this 27th day of January, 1956,

ORDERED, ADJUDGED, and DECREED:

1. That Alfred S. Moses, Jr., a member of a class of persons as described in Rule 23(a) of Federal Rules of Civil Procedure for which class the plaintiff herein, Herman R. Emmet, Jr., seeks to enforce a right, is hereby given leave to intervene in this action and to file his Petition in Intervention, copy of which is attached to the Motion for Leave to Intervene, in order to more fully insure the adequate representation of all members of said class.

CHARLES F. McLAUGHLIN
Judge

Petition in Intervention of Moses, Filed February 1, 1956

Intervenor, Alfred S. Moses, Jr., by leave of Court first had and obtained, as and for his Petition in Intervention, alleges:

1. Intervenor Moses is a citizen of the United States, a resident of the State of Connecticut, residing at 15 Buena Vista Road, West Hartford, Connecticut, is over 21 years of age and is under no disability to bring this action. Defendant Harvey V. Higley is the Administrator of Veterans Affairs of the United States, Defendant George Magoffin Humphrey is Secretary of the Treasury of the United States, Defendant Ivy Baker Priest is the Treasurer of the United States, and Defendant Joseph Campbell is Comptroller General of the United States.

2. Jurisdiction to intervene is founded on Rules 23 and 24, Federal Rules of Civil Procedure. Jurisdiction of the substantive issues involved in the primary action is founded upon provisions set forth in the Complaint heretofore filed by Herman L. R. Emmet, Jr., which Intervenor adopts.

3. Intervenor Moses hereby adopts all of the general allegations set forth in paragraphs 3, 7, 8, 9, 10, 11 and 13 in the Complaint heretofore filed in this case by Herman L. R. Emmet, Jr. and incorporates them herein by reference as fully as though set forth herein at length.

4. Intervenor Moses is the owner of National Service Life Insurance Policy No. V-315-51-57, a 30 Payment Life Policy for \$10,000 converted on September 1, 1951 from original term policy which intervenor believes, and therefore avers was No. V-130-34-81, though it may have been designated some other number which readily can be ascertained by Defendant Higley from records of the Veterans Administration, on which said Term and 30 Payment Life Policies all premiums were paid as they became due so that the same have at all times from original issuance to the present been in full force and effect.

5. Intervenor Moses for more than one month prior to his induction into the Army of the United States on or about February 10, 1941, was the owner of New York Life Insurance Company Policy No. 17-773-739 in the face amount of \$2,500.00 with an annual premium of \$55.83. Upon application by Intervenor Moses to said New York Life

Insurance Company on the appropriate Veterans Administration insurance form (which he believes was designated as Form 380) and approval thereof by the Veterans Administration, said policy of insurance was protected against lapse for non-payment of premium by intervenor under the terms and provisions of Article IV of the Soldiers' and Sailors' Civil Relief Act of 1940. Intervenor was separated from active service in the Army of the United States on April 17, 1946.

6. At or about the time intervenor Moses was separated from active service he made inquiry of New York Life Insurance Company and was informed that the total amount that would be owing for premiums through the premium due March 12, 1947 (the 6th annual premium) would be \$332.11. Subsequently in March 1948 he was advised that the total guaranteed by the Government to April 17, 1948 was \$407.15. Intervenor notes from the policy that the 7th year cash value would be \$140, and intervenor assumes that approximately that sum was applied toward payment of the said premium obligation, leaving a balance of \$267.15 more or less, depending on the exact cash value figure, owing to said New York Life Insurance Company by the United States Government in accordance with the terms and provisions of said Soldiers' and Sailors' Civil Relief Act of 1940, but no obligation by intervenor Moses either to said New York Life Insurance Company or to the United States Government.

7. Pursuant to an announcement by Veterans' Administration that a special dividend, known as the "1948 Special Dividend," had been declared on policies of National Service Life Insurance, intervenor Moses duly filed an application for said special dividend and in due course of events was advised by the Veterans Administration that he was entitled to a dividend concerning the amount of which Intervenor Moses presently has no record, but that the Veterans Administration had set off against said dividend an alleged indebtedness to the United States in an

amount which intervenor Moses believes, and therefore avers was in the neighborhood of \$240.00, which indebtedness was allegedly incurred through the lapsing of intervenor's aforesaid policy of commercial life insurance and the payment by the United States of the amount certified by the Veterans Administration to be due the aforesaid New York Life Insurance Company as an award under Sec. 406 of Article IV of the Soldiers' and Sailors' Civil Relief Act, as amended October 16, 1942, (Title 50 Appendix United States Code, Sec. 546) on account of protection against lapse of the aforesaid insurance policy issued by the New York Life Insurance Company, illegally, without justification and to the great damage of intervenor Moses. As the exact information concerning the amount of the "1948 special dividend" and the offset made against it, and any further dividends and offsets against them, are peculiarly within the knowledge of defendants, intervenor Moses calls on defendants to furnish said information and to render an accounting of the funds due him which have been illegally retained and diverted from the intervenor.

WHEREFORE, intevenor demands:

1. That he and all other members of the class of persons similarly situated to him be joined as parties plaintiff with Herman L. R. Emmet, Jr. for the prosecution of the relief sought herein.
2. That the Court issue a permanent injunction preventing and restraining the defendants and each of them from continuing any construction of the terms and provisions of the Soldiers' and Sailors' Civil Relief Act of 1940 (Act of Oct. 17, 1940, c. 888 Secs. 400-415; 54 Stat. 1183) which asserts personal liability, over and above the capital value of their respective policies of Commercial Life Insurance protected pursuant to said Act, from intervenor and other members of the class of persons similarly situated due the United States for payments made by the United States

to said Commercial Life Insurance companies in settlement of the liabilities of the United States arising under the original Soldiers' and Sailors' Civil Relief Act of 1940.

3. That the Court order the Administrator of Veterans Affairs to account for all dividends and funds declared due and payable to, but withheld or obtained from intervenor and other members of the class of persons similarly situated on the basis of an asserted personal liability under the provisions of the original Soldiers' and Sailors' Civil Relief Act of 1940, over and above the capital values of his and their respective protected policies of commercial life insurance at the time said policies lapsed.

4. That the Court impress a trust for the benefit of intervenor and other members of the class of persons similarly situated upon so much of said funds credited to the appropriation for the payment of claims under Article IV of the Soldiers' and Sailors' Civil Relief Act, as amended October 16, 1942, as were obtained and credited to said appropriation pursuant to the present construction given the original Article IV of the Soldiers' and Sailors' Civil Relief Act of 1940 by the Administrator of Veterans Affairs from any source other than the capital values of protected policies of commercial life insurance.

5. That the Court issue a mandatory injunction enjoining the defendants, and each of them, from further refusing or failing to take such steps as may be necessary to pay out from said fund and distribute to intervenor and other members of the class of persons similarly situated amounts equal to their respective National Service Life Insurance dividends and/or other funds withheld or obtained from them on the sole basis of an asserted personal liability under the aforesaid Soldiers' and Sailors' Civil Relief Act of 1940, and directing the defendants forthwith to make such payments.

6. That the Court issue Mandatory Injunctions in the nature of Writs of Mandamus directed to the defendants,

ordering them to perform the ministerial acts and functions of their respective offices, to carry out their statutory and lawful duties in administering the provisions relating to National Service Life Insurance, especially the payment of dividends when declared and due thereunder without unlawful and illegal withholdings or setoffs, and the payment of disability compensation when declared payable to intervenor and all other persons similarly situated.

7. That this Honorable Court grant to this intervenor and other members of the class of persons similarly situated such other and further relief as shall seem meet, just and proper.

Alfred S. Moses, Jr.
ALFRED S. MOSES, JR.

BUTLER, KOEHLER & TAUSIG
By HENRY F. BUTLER

Attorneys for Intervenor
1039 Investment Building
Washington 5, D. C.

Answer of Defendants to Complaint, Filed March 2, 1956

FIRST DEFENSE

The complaint fails to state a claim against defendants upon which relief may be granted.

SECOND DEFENSE

The Court lacks jurisdiction of the subject matter of this complaint.

THIRD DEFENSE

The complaint states a claim, if at all, against the United States which is not a party to this action.

FOURTH DEFENSE

Plaintiff has failed to exhaust his administrative remedies as to defendant Joseph Campbell.

FIFTH DEFENSE

The Court is without jurisdiction to grant the relief requested.

SIXTH DEFENSE

Answering the numbered paragraphs of the complaint specifically, defendants aver as follows:

1. Defendants admit the allegations contained in the second sentence of paragraph 1. They are without knowledge or information sufficient to form a belief as to the truth of the remaining allegations thereof.

2. Defendants are not required to answer the allegations contained in paragraph 2.

3. Defendants deny that this suit can be maintained as a class action.

4. Admitted.

5. In answer to paragraph 5, defendants aver that pursuant to plaintiff's application, his life insurance policy No. 17,800,895, with the New York Life Insurance Company, in the face amount of \$5,000, with an annual premium of \$81.60, was protected from lapse for non-payment of premiums from January 27, 1941 to March 3, 1946 under the provisions of the Soldiers' and Sailors' Civil Relief Act of 1940, as amended. Upon the termination of protection the total amount of premiums due was \$475.85, to which sum the cash surrender value of \$138.25 was credited, leaving a balance of \$337.60.

6. In answer to paragraph 6, defendants aver that on August 7, 1946 an award of \$337.60 was made to the New York Life Insurance Company under the provisions of the Soldiers' and Sailors' Civil Relief Act of 1940, as amended, and payment thereof was made on September 25, 1946. Plaintiff was duly notified of said payment and requested to remit such amount, but failed to do so. On August 3, 1950 plaintiff was advised that a 1948 Special National Service Life Insurance Dividend of \$132.00 had been ap-

plied to his indebtedness, leaving a balance due of \$205.60. Thereafter, from May 1951 through June 1952 plaintiff's disability compensation of \$15.00 per month was withheld until the indebtedness had been fully discharged.

7. Admitted.

8 and 9. The allegations contained in paragraphs 8 and 9 are conclusions which require no answer, but if answer is required they are denied.

10. In answer to paragraph 10 defendants aver that the allegations contained therein are immaterial, but state that where balances were found to be due under the aforementioned act, efforts were made to collect the indebtedness and suit was instituted in some cases.

11. Denied.

12. Defendants admit that plaintiff has protested to the Veterans Administration and been refused payment. Defendant Joseph Campbell denies that any demand has been made upon him or any claim filed, and he thus has had no opportunity to act officially. Defendants deny that their conduct has been unlawful.

13. Denied.

WHEREFORE, defendants demand judgment together with the costs of this action.

/s/ Leo A. Rover

LEO A. ROVER

United States Attorney

/s/ Oliver Gasch

OLIVER GASCH

Assistant United States Attorney

/s/ Frank H. Strickler

FRANK H. STRICKLER

Assistant United States Attorney

/s/ Catherine B. Kelly

CATHERINE B. KELLY

Assistant United States Attorney

**Answer to Petition of Intervenor Van Valkenburgh.
Filed March 10, 1956**

FIRST DEFENSE

The complaint fails to state a claim against defendants upon which relief may be granted.

SECOND DEFENSE

The Court lacks jurisdiction of the subject matter of this complaint.

THIRD DEFENSE

The complaint states a claim, if at all, against the United States, which is not a party to this action.

FOURTH DEFENSE

Plaintiff has failed to exhaust his administrative remedies as to defendant Joseph Campbell.

FIFTH DEFENSE

The Court is without jurisdiction to grant the relief requested.

SIXTH DEFENSE

Answering the numbered paragraphs of the complaint specifically, defendants aver as follows:

1. Defendants admit the allegations contained in the second sentence of paragraph 1. They are without knowledge or information sufficient to form a belief as to the truth of the remaining allegations thereof.

2. Defendants are not required to answer the allegations contained in paragraph 2.

3. In answer to paragraph 3, defendants hereby adopt the answers to the allegations set forth in paragraphs 3, 7, 8, 9, 10, 11 and 13 of the complaint heretofore pled by Herman L. R. Emmet, Jr.

4. Admitted.

5. In answer to paragraph 5, defendants aver that plaintiff was inducted into the Army on February 10, 1941, less than a month after he became the owner of the alleged policy. Defendants further aver that pursuant to plaintiff's

application, his life insurance policy No. 17-797-163, with the New York Life Insurance Company, in the face amount of \$5,000.00 with an annual premium of \$104.95, was protected from lapse for non-payment of premium from February 11, 1941 to May 29, 1948 under the provisions of the Soldiers' and Sailors' Civil Relief Act of 1940, as amended. Upon the termination of protection the total amount of premiums due was \$793.81, to which sum the cash surrender value of \$326.05 was credited, leaving a balance of \$467.76.

6. In answer to paragraph 6, defendants aver that on September 10, 1948, an award of \$467.76 was made to the New York Life Insurance Company under the provisions of the Soldiers' and Sailors' Civil Relief Act of 1940, as amended, and payment thereof was made on December 6, 1948. Plaintiff was duly notified of said payment and requested to remit such amount, but failed to do so. On September 12, 1950, a 1948 Special National Service Life Insurance Dividend of \$66.00 was applied to this indebtedness, and on September 11, 1952 a 1951 Special National Service Life Insurance Dividend of \$170.00 was applied thereto, leaving a balance of \$231.76. Defendants admit that the United States has made demand.

WHEREFORE, defendants, having fully answered, demand judgment together with the costs of this suit.

/s/ Leo A. Rover

LEO A. ROVER

United States Attorney

/s/ Oliver Gasch

OLIVER GASCH

Assistant United States Attorney

/s/ Frank H. Strickler

FRANK H. STRICKLER

Assistant United States Attorney

/s/ Catherine B. Kelly

CATHERINE B. KELLY

Assistant United States Attorney

**Answer to Petition of Intervenor Moses
Filed March 23, 1956**

FIRST DEFENSE

The complaint fails to state a claim against defendants upon which relief may be granted.

SECOND DEFENSE

The Court lacks jurisdiction of the subject matter of this complaint.

THIRD DEFENSE

The complaint states a claim, if at all, against the United States, which is not a party to this action.

FOURTH DEFENSE

Plaintiff has failed to exhaust his administrative remedies as to defendant Joseph Campbell.

FIFTH DEFENSE

The Court is without jurisdiction to grant the relief requested.

SIXTH DEFENSE

Answering the numbered paragraphs of the complaint specifically, defendants aver as follows:

1. Defendants admit the allegations contained in the second sentence of paragraph 1. They are without knowledge or information sufficient to form a belief as to the truth of the remaining allegations thereof.

2. Defendants are not required to answer the allegations contained in paragraph 2.

3. In answer to paragraph 3, defendants hereby adopt the answers to the allegations set forth in paragraphs 3, 7, 8, 9, 10, 11 and 13 of the complaint heretofore pled by Herman L. R. Emmet, Jr.

4. Admitted insofar as the allegations are material.

5. In answer to paragraph 5 defendants aver that pursuant to plaintiff's application, his life insurance policy

No. 17-773-739 with the New York Life Insurance Company, in the face amount of \$2,500.00 with an annual premium of \$55.83, was protected from lapse for non-payment of premiums from March 12, 1941 to April 17, 1948 under the provisions of the Soldiers' and Sailors' Civil Relief Act of 1940, as amended. Upon the termination of protection the total amount of premiums due was \$407.15, to which sum the cash surrender value of \$167.91 was credited, leaving a balance of \$239.24.

6. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 6.

7. In answer to paragraph 7, defendants aver that on October 22, 1948, payment of an award of \$239.24 was made to the New York Life Insurance Company under the provisions of the Soldiers' and Sailors' Civil Relief Act of 1940, as amended. Plaintiff was duly notified of said payment and requested to remit such amount, but failed to do so. On June 2, 1950, this indebtedness was liquidated by a set-off of \$239.24 against a 1948 Special National Service Life Insurance Dividend for which plaintiff had applied.

WHEREFORE, defendants demand judgment together with the costs of this action.

/s/ Leo A. Rover

LEO A. ROVER

United States Attorney

/s/ Oliver Gasch

OLIVER GASCH

Assistant United States Attorney

/s/ Frank H. Strickler

FRANK H. STRICKLER

Assistant United States Attorney

/s/ Catherine B. Kelly

CATHERINE B. KELLY

Assistant United States Attorney

Order Granting Plesha, J. E. Mabbutt, R. H. Mabbutt, and Johnson Leave to Intervene, Matthews, J., Filed November 20, 1956

Upon consideration of the Motion for Leave to Intervene herein filed by Paul E. Plesha, James E. Marbutt, Robert H. Marbutt and Robert R. Johnson, by their attorneys, it is on this 20th day of November, 1956, ORDERED, ADJUDGED, and DECREED:

1. That Paul E. Plesha, James E. Marbutt, Robert H. Marbutt and Robert R. Johnson, members of a class of persons as described in Rule 23(a) of Federal Rules of Civil Procedure for which class the plaintiff herein, Herman R. Emmet, Jr., seeks to enforce a right, are hereby given leave to intervene in this action and to file their Petition in Intervention, copy of which is attached to the Motion for Leave to Intervene, in order more fully to insure the adequate representation of all members of said class.

BURNITA SHELTON MATTHEWS
Judge

Petition in Intervention of Plesha, J. E. Mabbutt, R. H. Mabbutt and Johnson, Filed November 21, 1956

Intervenors allege:

1. Intervenors Paul E. Plesha, James E. Mabbutt, Robert H. Mabbutt and Robert R. Johnson, and each of them, are citizens of the United States, residents of the State of California, over twenty-one years of age and are under no disability to bring this action. Defendant Harvey V. Higley is Administrator of Veterans Affairs of the United States, Defendant George Magoffin Humphrey is Secretary of the Treasury of the United States, Defendant Ivy Baker Priest is Treasurer of the United States and Defendant Joseph Campbell is Comptroller General of the United States.

2. Jurisdiction to intervene is founded on Rules 23 and 24, Federal Rules of Civil Procedure. Jurisdiction of the

substantive issues involved in the primary action is founded upon provisions set forth in Paragraph 2 of the Complaint heretofore filed by Herman L. R. Emmet, Jr., which Interveners adopt.

3. Interveners hereby adopt all of the general allegations set forth in Paragraphs 3, 7, 8, 9, 10, 11 and 13 in the Complaint heretofore filed in this case by Herman L. R. Emmet, Jr. and incorporate them herein by reference as fully as though set forth herein at length.

4. Interveners and each of them became members of the Armed Forces of the United States prior to October 6, 1942, and actually served therein prior to October 6, 1942.

5. Interveners and each of them were the owners, during their military service, of one or more policies of life insurance issued by the United States under the said National Service Life Insurance Act.

6. Interveners and each of them, prior to their induction into the Armed Forces of the United States were owners of commercial life insurance policies issued to them by the California Western States Life Insurance Company, which policies, upon application by intervenors and each of them to said California Western States Life Insurance Company on the appropriate Veterans Administration insurance forms, and upon approval thereof by the Veterans Administration, were protected against lapse for non-payment of premiums by intervenors under the terms and provisions of Article IV of the Soldiers' and Sailors' Civil Relief Act of 1940.

7. Interveners and each of them completed their tours of active duty in the Armed Forces of the United States and were separated therefrom shortly after the cessation of hostilities in World War II. The policies of life insurance which said Interveners had obtained from said California Western States Life Insurance Company, and each of such policies, were thereafter allowed to lapse and by reason

thereof the United States was called upon to pay and did pay to said insurance company on account of the policy of Paul E. Plesha the sum of \$261.05, on account of the policy of James E. Mabbutt the sum of \$205.75, on account of the policy of Robert H. Mabbutt the sum of \$205.96, and on account of the policy of Robert R. Johnson the sum of \$160.95.

8. In accordance with 38 U.S.C.A. Section 802(f) and regulations issued pursuant thereto by the Administrator of Veterans Affairs, a special dividend was declared by said Administrator to be paid from the surplus in the National Service Life Insurance Fund to each holder of a policy issued under said National Service Life Insurance Act prior to the year 1948, who should file claim for such dividend with said Administrator.

9. Thereafter each of the Intervenorrs made timely claim, on the form provided by said Administrator for such purpose, for all moneys due to him on account of dividends or special dividends payable on his said policy of life insurance. In due course each of the said Intervenorrs was advised by the then Administrator of Veterans Affairs that he was entitled to receive a special dividend on his said policy in the amount hereinafter set forth, but the said Administrator did not pay to Intervenorrs, or any of them, nor to any of said persons similarly situated, the full amount of his said special dividends, but deducted from each such dividend the amount which had been paid to said insurance company on account of the protection of the commercial life insurance of the Intervenor or person similarly situated to whom such dividend was payable, less credits for any amounts paid to the United States by any of Intervenorrs or any of such persons similarly situated. The money so deducted and withheld has come into the possession and under the control of Defendant George Magoffin Humphrey, as Secretary of the Treasury, and Defendant Ivy Baker Priest, as Treasurer of the United States.

10. Thereafter and on May 19, 1950, Intervenor Paul E. Plesha filed in the District Court of the United States for the Northern District of California, Northern Division, Civil Action No. 6326, a suit against the United States of America to enforce payment of the balance of his said special dividend. Thereafter and on February 12, 1951, Intervenor James E. Mabbutt and one Myron L. Kern filed motions to intervene as parties plaintiff in said action which said motions were granted on February 19, 1951. The said action was tried before said District Court which gave judgment for the United States. Upon appeal by said plaintiffs said judgment was reversed by the United States Court of Appeals for the Ninth Circuit. Thereafter the Supreme Court of the United States granted the petition of the United States for a writ of certiorari, and said action is now pending before said Court as No. 39, October Term, 1956.

11. Intervenors Paul E. Plesha and James E. Mabbutt and said Myron L. Kern employed and retained Lawrence A. Schei, an attorney at law licensed to practice before the Courts of the State of California, the United States District Court for the Northern District of California, and the United States Court of Appeals for the Ninth Circuit, and a member of the firm of White, Harber & Schei, to prosecute said action in their behalf, and have also employed Philip C. Wilkins, an attorney at law admitted to practice before the Supreme Court of the United States, to assist in the prosecution of said action. Said attorneys have rendered substantial services in the prosecution of said action. To date said Intervenors have incurred costs and expenses in connection with the prosecution of said action in the amount of \$1,982.76, and they expect to incur additional costs and expenses in such connection.

12. Intervenors Robert H. Mabbutt and Robert R. Johnson filed, on January 13, 1956, in the District Court of the United States for the Northern District of California, Civil

Action No. 7341, a suit against the United States of America, on behalf of themselves and all persons similarly situated, seeking to enforce payment of the balance of their said special dividends and payment of the balance of the said special dividends payable to all persons similarly situated. Said action is now pending before said District Court.

13. Said Intervenor, Robert H. Mabbutt and Robert R. Johnson employed and retained Lawrence A. Schei, an attorney at law licensed to practice before the Courts of the State of California, the United States District Court for the Northern District of California, and a member of the firm of White, Harber & Schei, to prosecute said action in their behalf and in behalf of all persons similarly situated. To date said Intervenor have incurred costs and expenses in said action in the amount of \$17.00.

14. That by reason of the filing and prosecution of said actions, the rights of all persons having similar claims against the United States have been protected and advanced, and will be established if the Supreme Court of the United States decides the said case of United States v. Plesha, et al, No. 39, October Term, 1956 in favor of Paul E. Plesha, James E. Mabbutt and Myron L. Kern, and rules that the United States is obligated to repay to all persons similarly situated the amounts it has obtained from them as set forth in this Petition in Intervention and in the Complaint on file herein.

WHEREFORE, Intervenor demand:

1. That they and all other members of the class of persons similarly situated to them be joined as party plaintiffs with Herman L. R. Emmet, Jr. for the prosecution of the relief sought herein.

2. That the Court issue a permanent injunction preventing and restraining Defendants and each of them from continuing any construction of the terms and provisions

of the Soldiers' and Sailors' Civil Relief Act of 1940 (Act of Oct. 17, 1940, c. 888 Secs. 400-415; 54 Stat. 1183) which asserts that Intervenor and other members of the class of persons similarly situated are personally liable to the United States for payments made by the United States in settlement of the obligations of the United States arising under the original Soldiers' and Sailors' Civil Relief Act of 1940, and from making further demands upon, threatening litigation against, or commencing further litigation against Intervenor or any member of the class of persons similarly situated on account of such alleged liability.

3. That the Court order Defendants herein to account for all funds withheld or obtained from Intervenor or any member of the class of persons similarly situated on the basis of such asserted personal liability under the provisions of the original Soldiers' and Sailors' Civil Relief Act of 1940, over and above the capital values of their respective protected policies of commercial life insurance at the time said policies lapsed.

4. That the Court impress a trust for the benefit of Intervenor and other members of the class of persons similarly situated upon so much of said funds credited to the appropriation for the payment of claims under Article IV of the Soldiers' and Sailors' Civil Relief Act, as amended October 16, 1942, as were obtained by the United States from Intervenor and all persons similarly situated by the assertion of such alleged personal liability.

5. That the Court issue a mandatory injunction enjoining the Defendants, and each of them, from further refusing or failing to take such steps as may be necessary to pay out from said fund and distribute to Intervenor and other members of the class of persons similarly situated the amounts of money so obtained from them, and directing the Defendants forthwith to make such payments.

6. That the Court issue writs of Mandamus directed to the Defendants, ordering them to perform the ministerial acts and functions of their respective offices, to carry out their statutory and lawful duties in administering the provisions relating to National Service Life Insurance, especially the payment of dividends when declared and due thereunder without unlawful and illegal withholdings or setoffs.

7. That any funds held by Defendants herein which may be impressed with a trust as herein prayed for be charged with the obligation to reimburse Intervenor for all costs and expenses incurred or to be incurred by them in instituting such action in the United States District Court for the Northern District of California and in prosecuting said actions to final judgment; and that such funds be further charged with an obligation to pay reasonable attorneys fees to Intervenor's said attorneys for their services to the class of persons similarly situated who shall benefit by the institution and prosecution of said actions and the rendition of such professional services by said attorneys.

8. That such funds so impressed with a trust be also charged with costs and expenses incurred and reasonable fees for professional services rendered by other attorneys in prosecuting or defending other actions, including this action, in other United States Courts, which actions challenged the alleged right of the United States to obtain reimbursement of amounts it had paid to insurance companies on account of the protection of commercial life insurance under Article IV of the original Soldiers' and Sailors' Civil Relief Act of 1940; and that the whole matter of allowing attorneys fees, apportioning them among the counsel involved, and of charging individual members of the class benefited with a fair share of such fees, costs and expenses be considered and decided by this Court and implemented with appropriate orders.

9. That this Honorable Court grant to these Intervenor and other members of the class of persons similarly situ-

of the Soldiers' and Sailors' Civil Relief Act of 1940 (Act of Oct. 17, 1940, c. 888 Secs. 400-415; 54 Stat. 1183) which asserts that Intervenor and other members of the class of persons similarly situated are personally liable to the United States for payments made by the United States in settlement of the obligations of the United States arising under the original Soldiers' and Sailors' Civil Relief Act of 1940, and from making further demands upon, threatening litigation against, or commencing further litigation against Intervenor or any member of the class of persons similarly situated on account of such alleged liability.

3. That the Court order Defendants herein to account for all funds withheld or obtained from Intervenor or any member of the class of persons similarly situated on the basis of such asserted personal liability under the provisions of the original Soldiers' and Sailors' Civil Relief Act of 1940, over and above the capital values of their respective protected policies of commercial life insurance at the time said policies lapsed.

4. That the Court impress a trust for the benefit of Intervenor and other members of the class of persons similarly situated upon so much of said funds credited to the appropriation for the payment of claims under Article IV of the Soldiers' and Sailors' Civil Relief Act, as amended October 16, 1942, as were obtained by the United States from Intervenor and all persons similarly situated by the assertion of such alleged personal liability.

5. That the Court issue a mandatory injunction enjoining the Defendants, and each of them, from further refusing or failing to take such steps as may be necessary to pay out from said fund and distribute to Intervenor and other members of the class of persons similarly situated the amounts of money so obtained from them, and directing the Defendants forthwith to make such payments.

6. That the Court issue writs of Mandamus directed to the Defendants, ordering them to perform the ministerial acts and functions of their respective offices, to carry out their statutory and lawful duties in administering the provisions relating to National Service Life Insurance, especially the payment of dividends when declared and due thereunder without unlawful and illegal withholdings or setoffs.

7. That any funds held by Defendants herein which may be impressed with a trust as herein prayed for be charged with the obligation to reimburse Intervenor for all costs and expenses incurred or to be incurred by them in instituting such action in the United States District Court for the Northern District of California and in prosecuting said actions to final judgment; and that such funds be further charged with an obligation to pay reasonable attorneys fees to Intervenor's said attorneys for their services to the class of persons similarly situated who shall benefit by the institution and prosecution of said actions and the rendition of such professional services by said attorneys.

8. That such funds so impressed with a trust be also charged with costs and expenses incurred and reasonable fees for professional services rendered by other attorneys in prosecuting or defending other actions, including this action, in other United States Courts, which actions challenged the alleged right of the United States to obtain reimbursement of amounts it had paid to insurance companies on account of the protection of commercial life insurance under Article IV of the original Soldiers' and Sailors' Civil Relief Act of 1940; and that the whole matter of allowing attorneys fees, apportioning them among the counsel involved, and of charging individual members of the class benefited with a fair share of such fees, costs and expenses be considered and decided by this Court and implemented with appropriate orders.

9. That this Honorable Court grant to these Intervenor and other members of the class of persons similarly situ-

ated such other and further relief as shall seem meet, just and proper.

Lawrence A. Schei

LAWRENCE A. SCHEI

Attorney for Intervenors

503 Bank of America Building
Sacramento, California

BUTLER, KOEHLER & TAUSIG

By Henry F. Butler

HENRY F. BUTLER

*Attorneys for Applicants
for Intervention.*

1039 Investment Building
Washington, D. C.

**Order Granting Hormel, Stilson & Deering Leave to Intervene.
Matthews, J., Filed December 11, 1956**

Upon consideration of the Motion For Leave To Intervene herein filed by Herman Hormel, Jr., Charles H. Stilson, Jr., and James A. Deering, by their attorneys, it is on this 11th day of December, 1956,

ORDERED, ADJUDGED and DECREED:

1. That Herman Hormel, Jr., Charles H. Stilson, Jr., and James A. Deering, members of a class of persons as described in Rule 23(a) of Federal Rules of Civil Procedure for which class the plaintiff herein, Herman R. Emmet, Jr., seeks to enforce a right, are hereby given leave to intervene in this action and to file their Petition in Intervention, copy of which is attached to the Motion for Leave to Intervene, in order more fully to insure the adequate representation of all members of said class.

BURNITA SHELTON MATTHEWS
Judge

**Petition in Intervention of Hormel, Stilson & Deering,
Filed December 13, 1956**

Interveners allege:

1. Intervener Herman Hormel, Jr., is a citizen of the United States and a resident of the State of New York. Intervener Charles H. Stilson, Jr., is a citizen of the United States and a resident of the State of New Jersey. Intervener James A. Deering is a citizen of the United States and a resident of the State of New York. Defendant Harvey V. Higley is Administrator of Veterans Affairs of the United States. Defendant George Magoffin Humphrey is Secretary of the Treasury of the United States. Defendant Ivy Baker Priest is Treasurer of the United States. Defendant Joseph Campbell is Comptroller General of the United States.

2. Jurisdiction to intervene is founded on Rules 23 and 24, Federal Rules of Civil Procedure. Jurisdiction of the substantive issues involved in the primary action is founded upon provisions set forth in paragraph 2 of the Complaint heretofore filed by Herman L. R. Emmet, Jr., which Interveners adopt.

3. Interveners hereby adopt all of the general allegations set forth in Paragraphs 3, 7, 8, 9, 10, 11 and 13 in the complaint heretofore filed in this case by Herman L. R. Emmet, Jr., and incorporate them herein by reference as fully as though set forth herein at length.

4. Interveners and each of them became members of the Armed Forces of the United States prior to October 6, 1942.

5. Interveners and each of them were the owners, during their military service, of one or more policies of life insurance issued by the United States under the said National Service Life Insurance Act.

6. Interveners and each of them, prior to their induction into the Armed Forces of the United States, were owners

of commercial life insurance policies, which policies, upon application by interveners and each of them to the respective insurance companies which issued said policies on the appropriate Veterans Administration insurance forms, and upon approval thereof by the Veterans Administration, were protected against lapse for non-payment of premiums by interveners under the terms and provisions of Article IV of the Soldiers' and Sailors' Civil Relief Act of 1940. Intervener Hormel, for more than one month prior to his induction into the Army of the United States on or about January 27, 1941, was the owner of life insurance policy No. 17,771,816 issued by the New York Life Insurance Company. Intervener Stilson for more than one month prior to his induction into the Army of the United States on or about January 27, 1941, was the owner of life insurance policies Nos. 17,766,519 and 17,764,184 issued by the New York Life Insurance Company. Intervener James A. Deering for more than one month prior to his induction into the Army of the United States on or about January 29, 1942, was the owner of life insurance policy No. 5,750,807 issued by the Mutual Life Insurance Company of New York.

7. Intervenors and each of them completed their tours of active duty in the Armed Forces of the United States and were separated therefrom shortly after the cessation of hostilities in World War II. The policies of commercial life insurance which said intervenors had obtained from their respective insurance companies, and had placed under the protection of Article IV of the Soldiers' and Sailors' Civil Relief Act of 1940, and each of such policies, were thereafter allowed to lapse and by reason thereof the United States was called upon to pay, and did pay, the said respective insurance companies on account of the policy of Herman Hormel, Jr., the sum of \$428.72; on account of the policies of Charles H. Stilson, Jr., the sum of \$488.43 and on account of the policy of James A. Deering the sum of \$524.05.

8. In accordance with 38 U.S.C.A. Section 802(f) and regulations issued pursuant thereto by the Administrator of Veterans Affairs, a special dividend was declared by said Administrator to be paid from the surplus of the National Service Life Insurance Fund to each holder of a policy issued under said National Service Life Insurance Act prior to the year 1948, who should file claim for such dividend with said Administrator.

9. Thereafter each of the interveners made timely claim, on the form provided by said Administrator for such purpose, for all moneys due to him on account of dividends or special dividends payable on his policy of life insurance. In due course each of the said Interveners was advised by the then Administrator of Veterans Affairs that he was entitled to receive a special dividend on his said policy, but the said Administrator did not pay to Interveners, or any of them, nor to any of said persons similarly situated, the full amount of his said special dividends, but deducted from each such dividend the amount which had been paid to the respective commercial life insurance companies on account of the aforesaid protection of the respective commercial life insurance policies of the Interveners or persons similarly situated to whom such dividend was payable, less credit for the cash surrender value of their respective policies and any amounts paid to the United States by any of Interveners or any of such persons similarly situated. The money so deducted and withheld has come into the possession and under the control of Defendant George Magoffin Humphrey, as Secretary of the Treasury, and Defendant Ivy Baker Priest, as Treasurer of the United States.

10. Thereafter and on November 30, 1950, Intervener Herman Hormel, Jr., filed in the District Court of the United States for the Southern District of New York, Civil Action No. 62-312, a suit against the United States of America on behalf of himself and all others similarly situ-

ated to enforce payment of the amount of his said special dividend unlawfully withheld. Thereafter, on or about December 11, 1950, Intervener Charles H. Stilson, Jr., filed a motion to intervene as a party plaintiff in said action, which said motion was granted in an opinion filed May 5, 1951, and reported at 11 Federal Rules Decisions 376. The said action was tried before the United States District Court for the Southern District of New York which found for the plaintiffs therein, and interveners herein, in an opinion filed in said Court on June 3, 1954, and reported at 123 Fed. Supp. 806. From a judgment entered January 6, 1956, in favor of the said Hormel and Stilson, the United States of America appealed to the United States Circuit Court of Appeals for the Second Circuit, but said appeal, by stipulation, is suspended pending the decision of the Supreme Court of the United States in the action of *United States of America v. Paul E. Plesha, et al*, argued before the United States Supreme Court on November 8, 1956.

11. Interveners Herman Hormel, Jr., and Charles H. Stilson, Jr., employed and retained Nathaniel F. Bedford, an Attorney-at-law, licensed to practice before the Courts of the State of New York, the United States District Court for the Southern District of New York, and the Court of Appeals for the Second Circuit, and a member of the firm of Tonnelé and Bedford, to prosecute said action in their behalf and on behalf of all others similarly situated. Their attorney has rendered substantial services in the prosecution of said action, both on behalf of plaintiffs Hormel and Stilson and on behalf of other members of their class. To date said interveners have incurred costs and expenses in the prosecution and furtherance of said action in an amount in excess of \$150.00, and they expect to incur additional costs and expenses in said action.

12. Intervener James A. Deering filed on December 30, 1955, in the District Court of the United States for the Southern District of New York, Civil Action No. 106-52, a

suit against the United States of America on behalf of himself and all other similarly situated, seeking to enforce payment of the balance of the National Service Life Insurance dividends payable to him, and the National Service Life Insurance dividends and other funds payable to all others similarly situated unlawfully withheld by the Administrator of Veterans Affairs, together with interest from the due date of such National Service Life Insurance dividends, at the average rate earned by the National Service Life Insurance fund, or the interest rate set on retained dividends by the Administrator of Veterans Affairs, whichever interest rate is greater. Said action is now pending before said District Court.

13. Said Intervener James A. Deering employed and retained Nathaniel F. Bedford, an Attorney-at-law licensed to practice before the courts of the State of New York, the United States District Court for the Southern District of New York, and the Court of Appeals for the Second Circuit, and a member of the firm of Tonnelé & Bedford, to prosecute said action in his behalf and on behalf of all others similarly situated. His attorney has rendered substantial services in the prosecution of said action, both on behalf of plaintiff Deering and on behalf of other members of his class. To date the said Intervener has incurred costs and expenses in the prosecution and furtherance of said action in excess of \$17.00 and he expects to incur additional costs and expenses in said action.

14. That by reason of the filing and prosecution of said actions, the rights of all persons having similar claims against the United States have been protected and advanced.

WHEREFORE, Interveners demand:

1. That they and all other members of the class of persons similarly situated to them be joined as party plaintiffs with Herman L. R. Emmet, Jr., for the prosecution of the relief sought herein.

2. That the Court issue a permanent injunction preventing and restraining Defendants and each of them from continuing any construction of the terms and provisions of the Soldiers' and Sailors' Civil Relief Act of 1940 (Act of Oct. 17, 1940, c. 888 Secs. 400-415; 54 Stat. 1183) which asserts that Interveners and other members of the class of persons similarly situated are personally liable to the United States for payments made by the United States in settlement of the obligations of the United States arising under the original Soldiers' and Sailors' Civil Relief Act of 1940, and from making further demands upon, threatening litigation against, or commencing further litigation against Interveners or any member of the class of persons similarly situated on account of such alleged liability.

3. That the Court order Defendants here in to account for all funds withheld or obtained from Interveners or any member of the class of persons similarly situated on the basis of such asserted personal liability under the provisions of the original Soldiers' and Sailors' Civil Relief Act of 1940, over and above the capital values of their respective protected policies of commercial life insurance at the time said policies lapsed.

4. That the Court impress a trust for the benefit of Interveners and other members of the class of persons similarly situated upon so much of said funds credited to the appropriation for the payment of claims under Article IV of the Soldiers' and Sailors' Civil Relief Act, as amended October 16, 1942, as were obtained by the United States from Interveners and all persons similarly situated by the assertion of such alleged personal liability.

5. That the Court issue a mandatory injunction enjoining the Defendants, and each of them, from further refusing or failing to take such steps as may be necessary to pay out from said fund and distribute to Interveners and other members of the class of persons similarly situated

the amounts of money so obtained from them, and directing the Defendants forthwith to make such payments.

6. That the Court issue writs of Mandamus directed to the Defendants, ordering them to perform the ministerial acts and functions of their respective offices, to carry out their statutory and lawful duties in administering the provisions relating to National Service Life Insurance, especially the payment of dividends when declared and due thereunder without unlawful and illegal withholdings or setoffs.

7. That any funds held by Defendants herein which may be impressed with a trust as herein prayed for be charged with the obligation to reimburse Interveners for all costs and expenses incurred or to be incurred by them in instituting such action in the United States District Court for the Southern District of New York and in prosecuting said actions to final judgment; and that such funds be further charged with an obligation to pay reasonable attorneys' fees to Interveners' said attorneys for their services to the class of persons similarly situated who shall benefit by the institution and prosecution of said actions and the rendition of such professional services by said attorneys.

8. That such funds so impressed with a trust be also charged with costs and expenses incurred and reasonable fees for professional services rendered by other attorneys in prosecuting or defending all actions, including this action, in this and in other United States Courts, which actions challenged the alleged rights of the United States to obtain reimbursements of amounts it had paid to insurance companies on account of the protection of commercial life insurance under Article IV of the original Soldiers' and Sailors' Civil Relief Act of 1940; and that the whole matter of allowing attorneys' fees, apportioning them among the counsel involved, and of charging individual members of the class benefited with a fair share of such

fees, costs and expenses be considered and decided by this Court and implemented with appropriate orders.

9. That the Court find that Interveners and the members of Interveners' class are entitled to interest on all National Service Life Insurance dividends withheld from the date payment of such dividends were due, at the average rate earned by the National Service Life Insurance Fund, or at the interest rate set on retained dividends by the Administrator of Veterans Affairs, whichever interest rate is greater.

10. That this Honorable Court grant to this plaintiff and other members of the class of persons similarly situated such other and further relief as shall seem meet, just and proper.

Dated: December 6, 1956.

Nathaniel F. Bedford
NATHANIEL F. BEDFORD
Attorney for Interveners
20 Pine Street
New York, N. Y.

BUTLER, KOEHLER & TAUSIG

By: Henry F. Butler
HENRY F. BUTLER
*Attorneys for Applicants
for Intervention*
1039 Investment Building
Washington, D. C.

Motion by Plaintiffs and Interveners for Judgment.
Filed August 1, 1957

Come now the plaintiff and the interveners herein and move this Court for a judgment in the form of a mandatory injunction directing the defendants to make payment to the plaintiff, interveners, and all other similarly situated veterans of the amounts due them as alleged in the complaint and petitions in intervention, together with interest thereon at 6 per cent per annum from the dates defendants withheld said amounts from the plaintiff, interveners, and all other similarly situated veterans, and said plaintiff and interveners also move this Court to determine how much of said amounts shall be allowed to them for taxable costs, litigation expenses and attorneys' fees, and as grounds for said motions, they refer this Court to the attached memorandum of points and authorities.

BUTLER, KOEHLER & TAUSIG

By: John Geyer Tausig
Nathaniel F. Bedford
Lawrence A. Schei
*Attorneys for Plaintiff and
Interveners*
1039 Investment Building
Washington 5, D. C.

Answer to Petition of Intervenor Johnson.
Filed August 21, 1957

FIRST DEFENSE

The complaint fails to state a claim against defendants upon which relief may be granted.

SECOND DEFENSE

The Court lacks jurisdiction of the subject matter of this complaint.

THIRD DEFENSE

The complaint states a claim, if at all, against the United States, which is not a party to this action.

FOURTH DEFENSE

Plaintiff has failed to exhaust his administrative remedies as to defendant Joseph Campbell.

FIFTH DEFENSE

The Court is without jurisdiction to grant the relief requested.

SIXTH DEFENSE

Answering specifically the numbered paragraphs of the complaint, defendants aver:

1. Defendants admit that Harvey V. Higley is Administrator of Veterans Affairs of the United States; that defendant Ivy Baker Priest is Treasurer of the United States; that defendant Joseph Campbell is Comptroller General of the United States, but defendants aver that Robert B. Anderson is the Secretary of the Treasury of the United States. Defendants are without knowledge or information sufficient to form a belief as to the truth of the remaining allegations of paragraph 1.

2. Defendants are not required to answer the allegations contained in paragraph 2.

3. Defendants hereby adopt the answers to the allegations set forth in paragraphs 3, 7, 8, 9, 10, 11 and 13 of the complaint heretofore filed by Herman L. R. Emmet, Jr.

4. Admitted.

5. Admitted.

6. Defendants aver that pursuant to plaintiff's application, his life insurance policy, No. 419936, with the California Western States Life Insurance Company, in the face

amount of \$2500.00, with an annual premium of \$37.80, was protected from lapse for non-payment of premiums from June 21, 1941 to October 31, 1945, under the provisions of the Soldiers and Sailors Civil Relief Act of 1940, as amended. Upon the termination of protection the total amount of premiums due was \$209.37, to which sum the cash surrender value and interest on dividends in the total amount of \$48.42 was credited, leaving a balance of \$160.95.

7. Defendants aver that, on April 13, 1946, payment of an award of \$160.95 was made to the California Western States Life Insurance Company under the provisions of the Soldiers and Sailors Civil Relief Act of 1940, as amended. Defendants are without knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in paragraph 7.

8. Defendants aver that plaintiff's policy participated in a special dividend which was declared to the extent of \$160.95. Defendants are not required to answer the remaining allegations in paragraph 8.

9. Defendants aver that plaintiff was duly notified of the payment of an award of \$160.95 to the California Western States Life Insurance Company. Plaintiff was requested to remit such amount but failed to do so. This indebtedness was liquidated by a setoff of \$160.95 against the special dividend which was declared. Insofar as the remaining allegations of paragraph 9 are material, they are denied.

10. Defendants are not required to answer the allegations contained in paragraph 10.

11. Defendants are not required to answer the allegations contained in paragraph 11, but if answer is required, defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 11.

12. Admitted.

13. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 13 of the complaint.

14. Denied.

WHEREFORE, defendants having fully answered, demand judgment, together with the costs of this action.

/s/ Oliver Gasch
OLIVER GASCH
United States Attorney

/s/ Edward P. Troxell
EDWARD P. TROXELL, *Principal*
Assistant United States Attorney

/s/ E. Riley Casey
E. RILEY CASEY
Assistant United States Attorney

/s/ Robert J. Asman
ROBERT J. ASMAN
Assistant United States Attorney

**Answer to Petition of Intervenor R. H. Mabbitt,
Filed August 21, 1957**

FIRST DEFENSE

The complaint fails to state a claim against defendants upon which relief may be granted.

SECOND DEFENSE

The Court lacks jurisdiction of the subject matter of this complaint.

THIRD DEFENSE

The complaint states a claim, if at all, against the United States, which is not a party to this action.

FOURTH DEFENSE

Plaintiff has failed to exhaust his administrative remedies as to defendant Joseph Campbell.

FIFTH DEFENSE

The Court is without jurisdiction to grant the relief requested.

SIXTH DEFENSE

Answering specifically the numbered paragraphs of the complaint, defendants aver:

1. Defendants admit that Harvey V. Higley is Administrator of Veterans Affairs of the United States; that defendant Ivy Baker Priest is Treasurer of the United States; that defendant Joseph Campbell is Comptroller General of the United States, but defendants aver that Robert B. Anderson is the Secretary of the Treasury of the United States. Defendants are without knowledge or information sufficient to form a belief as to the truth of the remaining allegations of paragraph 1.

2. Defendants are not required to answer the allegations contained in paragraph 2.

3. Defendants hereby adopt the answers to the allegations set forth in paragraphs 3, 7, 8, 9, 10, 11 and 13 of the complaint heretofore filed by Herman L. R. Emmet, Jr.

4. Admitted.

5. Admitted.

6. Defendants aver that pursuant to plaintiff's application, his life insurance policy, No. 419872, with the California Western States Life Insurance Company, in the face amount of \$2500.00, with an annual premium of \$37.80, was protected from lapse for non-payment of premiums from June 20, 1941 to January 25, 1947, under the provisions of the Soldiers and Sailors Civil Relief Act of 1940, as amended. Upon the termination of protection, the total

amount of premiums due was \$276.13, to which sum the cash surrender value and interest on dividends in the total amount of \$70.17 was credited, leaving a balance of \$205.96.

7. Defendants aver that, on April 9, 1947, payment of an award of \$205.96 was made to the California Western States Life Insurance Company, under the provisions of the Soldiers and Sailors Civil Relief Act of 1940, as amended. Defendants are without knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in paragraph 7.

8. Defendants aver that plaintiff's policy participated in a special dividend which was declared to the extent of \$205.96. Defendants are not required to answer the remaining allegations of paragraph 8.

9. Defendants aver that plaintiff was duly notified of the payment of an award of \$205.96 made to the California Western States Life Insurance Company. Plaintiff was requested to remit such amount, but failed to do so. This indebtedness was liquidated by a setoff of \$205.96 against the special dividend which was declared. Insofar as the remaining allegations of paragraph 9 are material, they are denied.

10. Defendants are not required to answer the allegations contained in paragraph 10 of the complaint.

11. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 11 of the complaint.

12. Admitted.

13. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 13.

14. Denied.

WHEREFORE, defendants having fully answered, demand judgment, together with the costs of this action.

/s/ Oliver Gasch
OLIVER GASCH
United States Attorney

/s/ Edward P. Troxell
EDWARD P. TROXELL, *Principal*
Assistant United States Attorney

/s/ E. Riley Casey
E. RILEY CASEY
Assistant United States Attorney

/s/ Robert J. Asman
ROBERT J. ASMAN
Assistant United States Attorney

**Answer to Petition of Intervenor J. E. Mabbutt,
Filed August 21, 1957**

FIRST DEFENSE

The complaint fails to state a claim against defendants upon which relief may be granted.

SECOND DEFENSE

The Court lacks jurisdiction of the subject matter of this complaint.

THIRD DEFENSE

The complaint states a claim, if at all, against the United States, which is not a party to this action.

FOURTH DEFENSE

Plaintiff has failed to exhaust his administrative remedies as to defendant Joseph Campbell.

amount of premiums due was \$276.13, to which sum the cash surrender value and interest on dividends in the total amount of \$70.17 was credited, leaving a balance of \$205.96.

7. Defendants aver that, on April 9, 1947, payment of an award of \$205.96 was made to the California Western States Life Insurance Company, under the provisions of the Soldiers and Sailors Civil Relief Act of 1940, as amended. Defendants are without knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in paragraph 7.

8. Defendants aver that plaintiff's policy participated in a special dividend which was declared to the extent of \$205.96. Defendants are not required to answer the remaining allegations of paragraph 8.

9. Defendants aver that plaintiff was duly notified of the payment of an award of \$205.96 made to the California Western States Life Insurance Company. Plaintiff was requested to remit such amount, but failed to do so. This indebtedness was liquidated by a setoff of \$205.96 against the special dividend which was declared. Insofar as the remaining allegations of paragraph 9 are material, they are denied.

10. Defendants are not required to answer the allegations contained in paragraph 10 of the complaint.

11. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 11 of the complaint.

12. Admitted.

13. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 13.

14. Denied.

WHEREFORE, defendants having fully answered, demand judgment, together with the costs of this action.

/s/ Oliver Gasch
OLIVER GASCH
United States Attorney

/s/ Edward P. Troxell
EDWARD P. TROXELL, *Principal*
Assistant United States Attorney

/s/ E. Riley Casey
E. RILEY CASEY
Assistant United States Attorney

/s/ Robert J. Asman
ROBERT J. ASMAN
Assistant United States Attorney

**Answer to Petition of Intervenor J. E. Mabbutt,
Filed August 21, 1957**

FIRST DEFENSE

The complaint fails to state a claim against defendants upon which relief may be granted.

SECOND DEFENSE

The Court lacks jurisdiction of the subject matter of this complaint.

THIRD DEFENSE

The complaint states a claim, if at all, against the United States, which is not a party to this action.

FOURTH DEFENSE

Plaintiff has failed to exhaust his administrative remedies as to defendant Joseph Campbell.

FIFTH DEFENSE

The Court is without jurisdiction to grant the relief requested.

SIXTH DEFENSE

Answering specifically the numbered paragraphs of the complaint, defendants aver:

1. Defendants admit that Harvey V. Higley is Administrator of Veterans Affairs of the United States; that defendant Ivy Baker Priest is Treasurer of the United States; that defendant Joseph Campbell is Comptroller General of the United States, but defendants aver that Robert B. Anderson is the Secretary of the Treasury of the United States. Defendants are without knowledge or information sufficient to form a belief as to the truth of the remaining allegations of paragraph 1.

2. Defendants are not required to answer the allegations contained in paragraph 2.

3. Defendants hereby adopt the answers to the allegations set forth in paragraphs 3, 7, 8, 9, 10, 11 and 13 of the complaint heretofore filed by Herman L. R. Emmet, Jr.

4. Admitted.

5. Admitted.

6. Defendants aver that pursuant to plaintiff's application, his life insurance policy with the California Western States Life Insurance Company, in the face amount of \$2500.00 was protected from lapse for non-payment of premiums from March 12, 1941 to February 22, 1947, under the provisions of the Soldiers and Sailors Civil Relief Act of 1940, as amended. Upon the termination of protection, the total amount of premiums due was \$269.25, to which sum the cash surrender value and interest on dividends in the total amount of \$63.50 was credited, leaving a balance of \$205.75.

7. Defendants aver that, on April 10, 1947, payment of an award of \$205.75 was made to the California Western States Life Insurance Company, under the provisions of the Soldiers and Sailors Civil Relief Act of 1940, as amended. Defendants are without knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in paragraph 7.

8. Defendants aver that plaintiff's policy participated in a special dividend which was declared to the extent of \$352.00. Defendants are not required to answer the remaining allegations of paragraph 8.

9. Defendants aver that plaintiff was duly notified of the payment of an award of \$205.75, made to the California Western States Life Insurance Company. Plaintiff was requested to remit such amount, but failed to do so. This indebtedness was liquidated by a setoff of \$205.75 against the special dividend which was declared. Insofar as the remaining allegations of paragraph 9 are material, they are denied.

10. Admitted.

11. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 11.

12. Defendants are not required to answer the allegations contained in paragraph 12 of the complaint.

13. Defendants are not required to answer the allegations contained in paragraph 13 of the complaint, but if answer is required, defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 13 of the complaint.

14. Denied.

WHEREFORE, defendants having fully answered, demand judgment, together with the costs of this action.

/s/ Oliver Gasch
OLIVER GASCH
United States Attorney

/s/ Edward P. Troxell
EDWARD P. TROXELL, *Principal*
Assistant United States Attorney

/s/ E. Riley Casey
E. RILEY CASEY
Assistant United States Attorney

/s/ Robert J. Asman
ROBERT J. ASMAN
Assistant United States Attorney

**Answer to Petition of Intervenor Hormel.
Filed August 21, 1957**

FIRST DEFENSE

The complaint fails to state a claim against defendants upon which relief may be granted.

SECOND DEFENSE

The Court lacks jurisdiction of the subject matter of this complaint.

THIRD DEFENSE

The complaint states a claim, if at all, against the United States, which is not a party to this action.

FOURTH DEFENSE

Plaintiff has failed to exhaust his administrative remedies as to defendant Joseph Campbell.

FIFTH DEFENSE

The Court is without jurisdiction to grant the relief requested.

SIXTH DEFENSE

The issues sought to be litigated in the instant case have already been adjudicated in favor of intervenor by order of the United States District Court for the Southern District of New York, entered January 3, 1956.

SEVENTH DEFENSE

Answering specifically the numbered paragraphs of the complaint, defendants aver as follows:

1. Defendants admit that Harvey V. Higley is Administrator of Veterans Affairs of the United States; that defendant Ivy Baker Priest is Treasurer of the United States; that defendant Joseph Campbell is Comptroller General of the United States, but defendants aver that Robert B. Anderson is the Secretary of the Treasury of the United States. Defendants are without knowledge or information sufficient to form a belief as to the truth of the remaining allegations of paragraph 1.

2. Defendants are not required to answer the allegations contained in paragraph 2.

3. Defendants hereby adopt the answers to the allegations set forth in paragraphs 3, 7, 8, 9, 10, 11 and 13 of the complaint heretofore filed by Herman L. R. Emmet, Jr.

4. Admitted.

5. Admitted.

6. Defendants aver that pursuant to plaintiff's application, his life insurance policy, No. 17771816, with the New York Life Insurance Company, in the face amount of \$5,000.00, with a monthly premium of \$10.00, was protected from lapse for non-payment of premiums from February

26, 1941 to February 10, 1948 under the provisions of the Soldiers and Sailors Civil Relief Act of 1940, as amended. Upon the termination of protection the total amount of premiums due was \$780.72, to which sum the cash surrender value and interest on dividends in the total amount of \$351.95 was credited, leaving a balance of \$428.77.

7. Defendants aver that, on August 4, 1948, payment of an award of \$428.77 was made to the New York Life Insurance Company under the provisions of the Soldiers and Sailors Civil Relief Act of 1940, as amended. Defendants are without knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in paragraph 7.

8. Defendants aver that plaintiff's policy participated in a special dividend which was declared on or about January 16, 1950 to the extent of \$462.00. Defendants are not required to answer the remaining allegations of paragraph 8.

9. Defendants aver that plaintiff was duly notified of the payment of an award of \$428.77 made to the New York Life Insurance Company. Plaintiff was duly notified of said payment and requested to remit such amount, but failed to do so. This indebtedness was liquidated by a setoff of \$351.95 against the special dividend which was declared on or about January 16, 1950. Insofar as the remaining allegations of paragraph 9 are material they are denied.

10. Admitted.

11. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 11.

12. Defendants are not required to answer the allegations contained in paragraph 12 of the complaint, but if answer is required, defendants are without knowledge or

information sufficient to form a belief as to the truth of the allegations contained in paragraph 12 of the complaint.

13. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 13 of the complaint.

14. Denied.

WHEREFORE, Defendants having fully answered, demand judgment, together with the costs of this action.

/s/ Oliver Gasch
OLIVER GASCH
United States Attorney

/s/ Edward P. Troxell
EDWARD P. TROXELL, *Principal*
Assistant United States Attorney

/s/ E. Riley Casey
E. RILEY CASEY
Assistant United States Attorney

/s/ Robert J. Asman
ROBERT J. ASMAN
Assistant United States Attorney

**Answer to Petition of Intervenor Deering,
Filed August 21, 1957**

FIRST DEFENSE

The complaint fails to state a claim against defendants upon which relief may be granted.

SECOND DEFENSE

The Court lacks jurisdiction of the subject matter of this complaint.

THIRD DEFENSE

The complaint states a claim, if at all, against the United States, which is not a party to this action.

FOURTH DEFENSE

Plaintiff has failed to exhaust his administrative remedies as to defendant Joseph Campbell.

FIFTH DEFENSE

The Court is without jurisdiction to grant the relief requested.

SIXTH DEFENSE

Answering specifically the numbered paragraphs of the complaint, defendants aver:

1. Defendants admit that Harvey V. Higley is Administrator of Veterans Affairs of the United States; that defendant Ivy Baker Priest is Treasurer of the United States; that defendant Joseph Campbell is Comptroller General of the United States, but defendants aver that Robert B. Anderson is the Secretary of the Treasury of the United States. Defendants are without knowledge or information sufficient to form a belief as to the truth of the remaining allegations of paragraph 1.

2. Defendants are not required to answer the allegations contained in paragraph 2.

3. Defendants hereby adopt the answers to the allegations set forth in paragraphs 3, 7, 8, 9, 10, 11 and 13 of the complaint heretofore filed by Herman L. R. Emmet, Jr.

4. Admitted.

5. Admitted.

6. Defendants aver that pursuant to plaintiff's application his life insurance policy with the Mutual Life Insurance Company of New York, in the face amount of \$5,000, with an annual premium of \$285.90, was protected from lapse for non-payment of premiums, from March 20, 1942 to January 7, 1947, under the provisions of the Soldiers and Sailors Civil Relief Act of 1940, as amended. Upon

the termination of protection, the total amount of premiums due was \$1643.80, to which sum the cash surrender value and interest on dividends in the total amount of \$1119.03 was credited, leaving a balance of \$524.05.

7. Defendants aver that, on May 26, 1947, payment of an award of \$524.05 was made to the Mutual Life Insurance Company of New York under the provisions of the Soldiers and Sailors Civil Relief Act of 1940, as amended. Defendants are without knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in paragraph 7.

8. Defendants aver that plaintiff's policy participated in a special dividend which was declared to the extent of \$524.05. Defendants are not required to answer the remaining allegations of paragraph 8.

9. Defendants aver that plaintiff was duly notified of the payment of an award of \$524.05 and requested to remit such amount but failed to do so. This indebtedness was liquidated by a setoff of \$524.05 against the special dividend which was declared. Insofar as the remaining allegations of paragraph 9 are material, they are denied.

10. Defendants are not required to answer the allegations contained in paragraph 10 of the complaint.

11. Defendants are not required to answer the allegations contained in paragraph 11 of the complaint.

12. Admitted, except that defendants deny that funds at the time were unlawfully withheld by the Administrator of Veterans Affairs.

13. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 13 of the complaint.

14. Denied.

WHEREFORE, defendants having fully answered, demand judgment, together with the costs of this action.

/s/ Oliver Gasch

OLIVER GASCH

United States Attorney

/s/ Edward P. Troxell

EDWARD P. TROXELL, *Principal*

Assistant United States Attorney

/s/ E. Riley Casey

E. RILEY CASEY

Assistant United States Attorney

/s/ Robert J. Asman

ROBERT J. ASMAN

Assistant United States Attorney

**Answer to Petition of Intervenor Plesha.
Filed August 21, 1957**

FIRST DEFENSE

The complaint fails to state a claim against defendants upon which relief may be granted.

SECOND DEFENSE

The Court lacks jurisdiction of the subject matter of this complaint.

THIRD DEFENSE

The complaint states a claim, if at all, against the United States, which is not a party to this action.

FOURTH DEFENSE

Plaintiff has failed to exhaust his administrative remedies as to defendant Joseph Campbell.

FIFTH DEFENSE

The Court is without jurisdiction to grant the relief requested.

SIXTH DEFENSE

Answering specifically the numbered paragraphs of the complaint, defendants aver:

1. Defendants admit that Harvey V. Higley is Administrator of Veterans Affairs of the United States; that defendant Ivy Baker Priest is Treasurer of the United States; that defendant Joseph Campbell is Comptroller General of the United States, but defendants aver that Robert B. Anderson is the Secretary of the Treasury of the United States. Defendants are without knowledge or information sufficient to form a belief as to the truth of the remaining allegations of paragraph 1.

2. Defendants are not required to answer the allegations contained in paragraph 2.

3. Defendants hereby adopt the answers to the allegations set forth in paragraphs 3, 7, 8, 9, 10, 11 and 13 of the complaint heretofore filed by Herman L. R. Emmet, Jr.

4. Admitted.

5. Admitted.

6. Defendants aver that pursuant to plaintiff's application, his life insurance policy with the California Western States Life Insurance Company, in the face amount of \$2500.00, was protected from lapse for non-payment of premiums from March 6, 1941 to October 20, 1947, under the provisions of the Soldiers and Sailors Civil Relief Act of 1940, as amended. Upon the termination of protection the total amount of premiums due was \$343.93 to which sum the cash surrender value and interest on dividends in the total amount of \$82.88 was credited, leaving a balance of \$261.05.

7. Defendants aver that, on January 2, 1948, payment of an award of \$261.05 was made to the California Western States Life Insurance Company under the provisions of the Soldiers and Sailors Civil Relief Act of 1940, as amended. Defendants are without knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in paragraph 7.

8. Defendants aver that plaintiff's policy participated in a special dividend to the extent of \$233.75. Defendants are

not required to answer the remaining allegations of paragraph 8.

9. Defendants aver that plaintiff was duly notified of the payment of an award of \$261.05 made to the California Western States Life Insurance Company. Plaintiff having made payments of \$40.00 toward his indebtedness, \$221.05 was withheld against this special dividend which was declared and the difference in the amount of \$12.70 was paid to plaintiff. Insofar as the remaining allegations of paragraph 9 are material, they are denied.

10. Admitted.

11. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 11.

12. Defendants are not required to answer the allegations contained in paragraph 12.

13. Defendants are not required to answer the allegations contained in paragraph 13, but if answer is required, defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 13.

14. Denied.

WHEREFORE, defendants having fully answered, demand judgment, together with the costs of this action.

/s/ Oliver Gasch

OLIVER GASCH

United States Attorney

/s/ Edward P. Troxell

EDWARD P. TROXELL, *Principal*

Assistant United States Attorney

/s/ E. Riley Casey

E. RILEY CASEY

Assistant United States Attorney

/s/ Robert J. Asman

ROBERT J. ASMAN

Assistant United States Attorney

**Answer to Petition of Intervenor Stilson,
Filed August 21, 1957**

FIRST DEFENSE

The complaint fails to state a claim against defendants upon which relief may be granted.

SECOND DEFENSE

The Court lacks jurisdiction of the subject matter of this complaint.

THIRD DEFENSE

The complaint states a claim, if at all, against the United States, which is not a party to this action.

FOURTH DEFENSE

Plaintiff has failed to exhaust his administrative remedies as to defendant Joseph Campbell.

FIFTH DEFENSE

The Court is without jurisdiction to grant the relief requested.

SIXTH DEFENSE

The issues sought to be litigated in the instant case have already been adjudicated in favor of intervenor by order of the United States District Court for the Southern District of New York, entered January 3, 1956.

SEVENTH DEFENSE

Answering specifically the numbered paragraphs of the complaint, defendants aver as follows:

1. Defendants admit that Harvey V. Higley is Administrator of Veterans Affairs of the United States; that defendant Ivy Baker Priest is Treasurer of the United States; that defendant Joseph Campbell is Comptroller General of the United States, but defendants aver that Robert B. Anderson is the Secretary of the Treasury of the United States. Defendants are without knowledge or information sufficient to form a belief as to the truth of the remaining allegations of paragraph 1.

2. Defendants are not required to answer the allegations contained in paragraph 2.

3. Defendants hereby adopt the answers to the allegations set forth in paragraphs 3, 7, 8, 9, 10, 11 and 13 of the complaint heretofore filed by Herman L. R. Emmet, Jr.

4. Admitted.

5. Admitted.

6. Defendants aver that pursuant to plaintiff's application his life insurance policy, No. 17766519, with the New York Life Insurance Company, in the face amount of \$2,000, with an annual premium of \$41.98, was protected from lapse for non-payment of premiums from February 28, 1941 to January 19, 1949 under the provisions of the Soldiers' and Sailors' Civil Relief Act of 1940, as amended. Pursuant to plaintiff's application, his life insurance policy, No. 17764184, with the New York Life Insurance Company, in the face amount of \$3,000, with an annual premium of \$62.97, was protected from lapse for non-payment of premiums from February 20, 1941 to January 19, 1949 under the provisions of the Soldiers' and Sailors' Civil Relief Act of 1940, as amended. On May 25, 1949, the New York Life Insurance Company was paid the sum of \$488.43, covering the balance of premiums owed by plaintiff and guaranteed by defendants as aforesaid.

7. Defendants aver that, on May 25, 1949, payment of an award of \$488.43 was made to the New York Life Insurance Company under the provisions of the Soldiers' and Sailors' Civil Relief Act of 1940, as amended. Defendants are without knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in paragraph 7.

8. Defendants aver that plaintiff's policies participated in a special dividend which was declared on or about January 16, 1950 to the extent of \$396.00. Defendants are not required to answer the remaining allegations of paragraph 8.

9. Defendants aver that plaintiff was duly notified of the payment of an award of \$488.43 made to the New York Life

Insurance Company. Plaintiff was requested to remit such amount, but failed to do so. This indebtedness was reduced by the withdrawal of \$396.00, the amount of the special dividend which was declared on or about January 16, 1950. Insofar as the remaining allegations of paragraph 9 are material, they are denied.

10. Admitted.

11. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 11.

12. Defendants are not required to answer the allegations contained in paragraph 12 of the complaint, but if answer is required, defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 12 of the complaint.

13. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 13 of the complaint.

14. Denied.

WHEREFORE, defendants having fully answered, demand judgment, together with the costs of this action.

/s/ Oliver Gasch
OLIVER GASCH
United States Attorney

/s/ Edward P. Troxell
EDWARD P. TROXELL, *Principal*
Assistant United States Attorney

/s/ E. Riley Casey
E. RILEY CASEY
Assistant United States Attorney

/s/ Robert J. Asman
ROBERT J. ASMAN
Assistant United States Attorney

Affidavit of Lawrence A. Schei, Filed August 27, 1957

STATE OF CALIFORNIA,
County of Sacramento, ss.:

• • • • •

That immediately after the argument of the *Plesha* case on November 14, 1955, affiant was informed by Lester S. Jayson, Esq., who argued the case for the United States; that the United States would assert the bar of the Statute of Limitations (six years under both 38 U.S.C. Secs. 445 and 817, and 28 U.S.C. Sec. 1346) against all persons in the same situation as said Paul E. Plesha unless such persons had appeared in this or other litigation or were otherwise protected from the running of the statute; that the *Plesha* case is not a class suit; that after discussion of the matter with some of the individuals directly concerned Robert H. Mabbutt and Robert R. Johnson employed affiant to commence an action against the United States in the United States District Court for the Northern District of California, Northern Division, on behalf of themselves and all persons similarly situated for the recovery of amounts deducted from their National Service Life Insurance dividend under circumstances similar to those in the *Plesha* case; that such an action was filed in said District Court on the 13th day of January, 1956, Civil Action No. 7341; that summons and complaint were thereupon served upon the United States; that by agreement with the United States Attorney the time of the United States to answer said complaint has been held open pending final disposition of the *Plesha* case and pending action in or concerning the instant case (*Emmet v. Higley et al*);

Order Substituting Secretary of Treasury Anderson as Party Defendant, Curran, J., Filed August 28, 1957

It appearing to the Court that George Magoffin Humphrey, as Secretary of the Treasury of the United States, is a party-defendant to this action, and during the pendency

thereof has resigned, and that within 6 months of the date of this order, his successor in the office of the Secretary of the Treasury of the United States, Robert B. Anderson, has taken office, and that there is a substantial need for continuing and maintaining this action against said successor, it is, therefore, this 28th day of August, 1957:

ORDERED that Robert B. Anderson, Secretary of the Treasury of the United States, shall be and is hereby substituted as a party defendant for George Magoffin Humphrey, Secretary of the Treasury of the United States.

CONSENTED To:

/s/ Edward M. Curran
Judge

/s/ Robert J. Asman
ROBERT J. ASMAN
Assistant United States Attorney

Affidavit of David A. Turner, Filed September 7, 1957

DISTRICT OF COLUMBIA, ss.:

Personally appeared before me, the undersigned authority for administering oaths, David A. Turner, of Washington, D. C., who, upon being duly sworn, deposes and says:

My name is David A. Turner and I am employed in the Office of the Office of the General Counsel, Veterans Administration, as Director, Litigation Service. I have been continuously employed in the Office of the General Counsel of the Veterans Administration since March 1, 1946, and, prior to the time, for more than 12 years I was employed in the Department of Justice, handling litigation arising in respect to matters handled by the Veterans Administration. I have general knowledge of the facts concerning the administration of the Soldiers' and Sailors' Civil Relief Act of 1940, of the administrative action declaring the existence of debts owing to the Government by ex-service-

men who invoked the protection of that Act for their policies of commercial life insurance, such debts having been administratively considered to have arisen by reason of the payment to the insurance companies of the premiums accruing during the serviceman's period of service and for the prescribed period thereafter. I also have general knowledge of the administrative action of the Veterans Administration respecting the declaration and payment of special and annual dividends under the National Service Life Insurance Act.

This affidavit is made for such use as may be appropriate in the above-entitled action.

On March 1, 1943, the Administrator of Veterans Affairs, in pursuance of his obligation to interpret and administer Article IV of the Soldiers' and Sailors' Civil Relief Act of 1940, issued Administrator's Decision No. 513 holding, in substance, that the 1940 Act imposed liability upon an applicant for the benefit of the Act to reimburse the Government to the extent of amounts paid by it on his account to the commercial insurer pursuant to the Government's statutory obligation. No ruling by the Administrator had been made prior to that time because of the fact that the settlement stage had not been reached. The holding in Administrator's Decision No. 513 was reexamined by a successor Administrator of Veterans Affairs on April 1, 1947, on which date Administrator's Decision No. 742 was released reaffirming and supplementing the prior holding. In Administrator's Decision 742 it was held, in line with general principles of law enunciated in such cases as *Gratiot v. United States*, 15 Pet. 336, 370; *United States v. Munsey Trust Co.*, 332 U.S. 234; 239; *McKnight v. United States*, 98 U.S. 179, 186, that the United States had the right to apply unappropriated moneys of its debtor in its hands to the extinguishment of his indebtedness to the United States and that collection of such indebtedness arising under the Soldiers' and Sailors' Civil Relief Act of 1940

could be effectuated from benefits otherwise payable under veterans' laws. As claims were submitted by private insurance companies settlements were made with such companies by the Government. And as a result of the payment of such claims individual indebtednesses were set up against the policyholders pursuant to the administrative construction aforesaid.

Commencing about 1950, collections by various means were made from ex-servicemen who had received protection under the Soldiers' and Sailors' Civil Relief Act of 1940 and the Amendments of 1942. Some collections were made by voluntary payments; some were made by reduction of the claim of the United States to judgment; some were compromised; others were made by application to the indebtednesses established aforesaid of moneys otherwise payable as disability compensation or pension provided under veterans' laws; others were made by application to said indebtedness of dividends declared under the National Service Life Insurance Act.

On or about January 15, 1950, the Administrator of Veterans Affairs declared special dividend on all National Service Life Insurance policies, thereby distributing a surplus which had accrued from the beginning of the National Service Life Insurance program to the anniversary date of policies in the calendar year 1948. This first special dividend amounted to approximately \$2,800,000,000 distributable to more than 16,000,000 policies. On or about February 1, 1951, the Administrator declared a second special dividend totalling approximately \$685,000,000 on National Service Life Insurance in force during the three-year period from 1948 to the anniversary date in 1951, said dividends to be payable in cash only. Neither of the aforesaid dividends was permitted to be left on deposit at interest pursuant to regulations duly promulgated, the validity of which has been sustained in a number of court decisions, including *Weiss v. United States*, 2 Cir. 187 F. 2d 610;

Parker v. United States, 5 Cir., 193 F. 2d 149; *Jones v. United States*, 8 Cir. 189 F. 2d 601; *Ferrara v. United States*, D.C.D.C., 100 F. Supp. 951; *Burk v. United States*, E.D. Ark., 133 F. Supp. 63. On December 19, 1951, the Administrator of Veterans Affairs declared a National Service Life Insurance dividend in the total approximate amount of \$200,000,000 covering the period from the 1951 policy anniversary date of each policy to the policy anniversary date of 1952, said dividend to be payable on the 1952 anniversary date. In subsequent years annual dividends have been declared on National Service Life Insurance in various amounts.

As above stated, regulations (VA regulation 3426.1, 14 FR 2832, effective April 29, 1949) provided that special dividends should be paid in cash only, could not be left to accumulate on deposit, and should not be available to pay premiums. On May 18, 1951, Congress enacted Public Law 36, 82nd Congress, amending Section 602(f), thereby requiring that unless the insured requested payment of dividends in cash any dividend accumulations and unpaid dividends should be applied in payment of premiums becoming due on insurance subsequent to the date the dividend is payable after January 1, 1952; that is to say, the dividends referred to in Public Law 36 could be paid in cash if requested, but otherwise could be used for no purpose but to pay premiums.

Dividends payable pursuant to the National Service Life Insurance Act were separate and individualistic in the sense that each policyholder received a dividend computed on various factors, such as his age, the length of time his policy had been in force, and the type of policy issued to him; each was therefore a separate and distinct obligation from the other.

As of June 30, 1956, the sum of \$2,295,198 had been applied to indebtednesses arising under both the Soldiers' and Sailors' Civil Relief Act of 1940 and the Soldiers' and

Sailors' Civil Relief Act of 1942 from dividends which had been declared under the National Service Life Insurance Act, and, as of June 30, 1952, the sum of \$1,358,725 had been so applied to indebtedness under both of said Soldiers' and Sailors' Civil Relief Acts by the use of dividends under the National Service Life Insurance Act. Collections under the Soldiers' and Sailors' Civil Relief Act of 1940 from all sources, i.e., from voluntary payments, from collections of judgments, from disability compensation, pension and other gratuitous benefits, from National Service Life Insurance dividends, totaled \$1,642,000, but figures are not presently available to establish the percentage of this \$1,642,000 figure which represented National Service Life Insurance dividends.

The National Service Life Insurance Fund, created pursuant to the provisions of Section 605 of the National Service Life Insurance Act, is not regarded by the Veterans Administration as a fund owned in common by the policyholders. On the contrary, however, it is a fund accumulated from the receipt of premium payments and earnings thereon accumulated from investments, which is designed primarily for the purpose of paying liabilities or losses, just as in the case of any other insurance company. Entitlement to any benefits other than the payment of a loss insured against results only from a declaration of dividends by the Administrator of Veterans Affairs. It is considered that the Fund was established for the bookkeeping convenience of the United States because even if the Fund were insufficient to pay the liabilities accruing by virtue of the issuance of the insurance the United States would have to pay losses and liabilities arising under its contracts.

Pursuant to the provisions of Article IV of the Soldiers' and Sailors' Civil Relief Act of 1940, a Soldiers' and Sailors' Civil Relief Revolving Fund was set up pursuant to appropriations by Congress for the purpose of paying obligations of the Government to insurance companies under

the provisions of the Act. There were a number of appropriation acts which earmarked moneys for this purpose, and, in addition, the Act of April 3, 1948 (62 Stat. 160) required the Administrator to deposit any moneys received as a repayment of debts incurred under the 1940 Act or the 1942 Act to the appropriation for the payment of claims under these Acts. Thereafter, pursuant to the provisions of the Second Supplemental Appropriation Act of 1953, approved March 28, 1953, 67 Stat. 16, and the Act approved June 24, 1954, 68 Stat. 292, \$1,500,000 was taken from the Soldiers' and Sailors' Civil Relief Revolving Fund and placed in the surplus funds of the Treasury.

After the decision of the Supreme Court in the case of *United States v. Plesha*, and following expiration of the period allowed for the filing of a petition for rehearing in that case, conferences were held between representatives of the Veterans Administration, the Department of Justice, and the General Accounting Office, for the purpose of devising ways and means of implementing the Court's decision by way of reimbursing all persons coming within the purview of that decision. As a result of these conferences it became apparent that not all cases were alike, that a number of legal questions were presented, and that serious questions existed as to the availability of funds not only for the payment of all such possible claims but for the payment of certain types of claims different from the usual type. Accordingly, on April 22, 1957, the Administrator of Veterans Affairs submitted the problem to the Comptroller General of the United States. A copy of his submission is filed herein. On June 24, 1957, the Comptroller General replied to the submission, and a copy of his reply is filed herein. These documents speak for themselves.

As a result of the suggestion contained in the Comptroller General's letter of June 24, 1957, the Administrator of Veterans Affairs recommended, on July 16, 1957, the enactment of a supplemental appropriation of an

additional sum of \$1,300,000 for the payment of Soldiers' and Sailors' Civil Relief claims for the purpose of making refunds on account of amounts collected by offset or otherwise from persons who made valid application for and were legally entitled to the protection of Article IV of the Soldiers' and Sailors' Civil Relief Act of 1940. The President submitted the proposal to the Congress, but I am informed and believe that counsel for the plaintiff in the instant case made objections to the Appropriations Committee of the House opposing the enactment of any such legislation, and the Appropriations Committee suggested that the matter be referred to the appropriate Legislative Committees. Accordingly, on August 12, 1957, the Administrator of Veterans Affairs submitted, with the consent of the President, a bill to authorize refunds by the Veterans Administration, and on August 20, 1957, Congressman Teague introduced H.R. 9369, a copy of which is attached hereto.

Efforts have been and are now being made by the Veterans Administration to process cases for payment, subject to availability of funds, in line with the holding of the Supreme Court in the Plesha case. So far a comparatively negligible number of claims have been received from eligible ex-servicemen since the Plesha decision.

/s/ David A. Turner
DAVID A. TURNER

Subscribed and sworn to before me this 6th day of September, 1957.

/s/ Mildred N. Wall
Notary Public—D. C.

SEAL

My Commission expires Aug. 15, 1962.

Exhibit 2 to Turner Affidavit, Filed September 7, 1957

To: The Administrator

From: General Counsel

Subject: Refunding of payments made and benefits offset by the Veterans Administration against *presumed* indebtedness of applicants under Article IV of the Soldiers' and Sailors' Civil Relief Act of 1940, arising from payment to their commercial insurance carriers.

• • • • •

3. Once the question of availability of funds is determined, the question arises as to whether the Veterans Administration should assume the initiative and make refunds without requiring any type of formal claim. This office is not aware of any provision of law, unless Section 237 of Title 31, U.S.C. is applicable, which conditions the right of a person to recover amounts improperly withheld from Veterans Administration benefits upon the filing of formal claim. In this connection it is not believed that Section 283 of Title 18 has any application to such a situation. It is thus concluded that whether a claim should be required to be filed is largely a matter of policy which should be determined by administrative expediency. In the case of National Service Life Insurance dividends offset, it would certainly appear that claims initially filed for payment of the dividend in cash should suffice and the same would apply to other benefits previously applied for.

• • • • •

9. Undoubtedly demand will be made (indeed has already been made) upon the Veterans Administration for payment of interest on amounts collected; and although it is the present view of this office that all such demands should be met with the statement of the general rule announced by the Supreme Court in *Worley v. United States*, 281 U.S. 339, 74 L. ed. 887 and other cases, that interest is not payable by the Government in the absence

of statutory authority, it is likely to be contended, at least in the case of insurance dividends withheld that interest should be paid upon the theory that dividends asked for but not paid to an insured were, to all intents and purposes, left on deposit and thus would draw interest. In this connection, it is necessary to note that under VA Regulation 3095, 38 C.F.R. 1949 Ed. 6.95, regular (annual) dividends from United States Government Life Insurance not withdrawn in cash are automatically left on deposit at interest rate fixed by the Administrator but not less than $3\frac{1}{2}\%$ per annum; and under VA Regulation 3426, 38 C.F.R. 1941 Supp. 8.26, *at the specific request of the insured* regular (annual) dividends from National Service Life Insurance, as distinguished from special dividends, could be left on deposit at interest rate fixed by the Administrator. However, after an amendment to such regulation on March 31, 1947, only dividends from permanent plan policies not on extended insurance could be left on deposit at interest. See 38 C.F.R. 1949 Ed., 8.26. Thus, dividends from National Service Life Insurance Term policies could not be left on deposit at interest after such date, and although such regulation was again amended on March 19, 1952, following passage of Public Law 36, 82d Congress, no change was made in this regard. (See 38 C.F.R. 1949 Ed. Pocket Supplement 8.26) No *annual* dividends became payable on National Service Life Insurance until the anniversary dates of policies in 1952, and in the meantime Public Law 36 was passed. It provides that National Service Life Insurance dividends not withdrawn in cash should be applied in payment of premiums becoming due after January 1, 1952. VA Regulation 3426A (38 C.F.R. 1949 Ed. 826a) provides that any special dividend declared prior to January 1, 1952, could not be left on deposit, and was payable only in cash. In any event, it appears logical to assume the position that inasmuch as dividends withheld to satisfy any such presumed indebtedness were withdrawn from the respective trust funds, such funds have discharged any liability they

may have had, with the result that when they were deposited in the Soldiers' and Sailors' Civil Relief Fund the dividends lost their character as such, and that any amounts now payable on account of the Supreme Court's decision in the *Plesha* case constitute a general indebtedness of the United States in its sovereign capacity, as to which the general rule with respect to payment of interest is applicable.

Amended Answer of Defendants. Filed October 3, 1957

Come now the defendants by their attorney, the United States Attorney, and amend their answers to the complaint and to all of the petitions in intervention, and as additional defenses aver as follows:

FIRST AMENDED DEFENSE

Following the decision in the case of *United States v. Paul E. Plesha, et al.*, 352 U.S. _____, which was decided by the Supreme Court of the United States on January 14, 1957, subsequent to the filing of the instant action, the defendant, Administrator of Veteran Affairs, undertook to set up procedures to effectuate payment to all veterans from whom collections had been made by setoff or otherwise, by reason of the Administrator's determination that a debt to the Government had arisen under the Soldiers' and Sailors' Civil Relief Act of 1940, as a result of payments to private insurance companies on behalf of veterans whose commercial life insurance policies had lapsed. The defendant, Administrator of Veterans Affairs, has sought and is seeking through legislation to obtain by appropriation the funds necessary to effect such payment to veterans. Attorneys for plaintiffs have been opposing such legislation.

SECOND AMENDED ANSWER

The funds claimed by plaintiffs' attorneys to be impressed with a trust for the benefit of plaintiffs and those similarly situated have been transferred and returned to the surplus of the Treasury of the United States by Act of

Congress under Public Law 11 (March 28, 1953), and Public Law 428 (June 24, 1954), 83rd Congress. The transfer occurred prior to the filing of the instant suit in December, 1955.

WHEREFORE, defendants having fully answered, demand judgment, together with the costs of this action.

/s/ Oliver Gasch
OLIVER GASCH
United States Attorney

/s/ Edward P. Troxell
EDWARD P. TROXELL, *Principal*
Assistant United States Attorney

/s/ E. Riley Casey
E. RILEY CASEY
Assistant United States Attorney

/s/ Robert J. Asman
ROBERT J. ASMAN
Assistant United States Attorney

Order Substituting Administrator of Veterans Affairs Whittier as Party Defendant, Curran, J., Filed December 23, 1957

It appearing to the Court that Harvey V. Higley, as Administrator of Veterans Affairs, is a party-defendant to this action, and during the pendency thereof has resigned, and that within 6 months of the date of this order, his successor in the office of Administrator of Veterans Affairs, Sumner G. Whittier, has taken office, and that there is a substantial need for continuing and maintaining this action against said successor, it is therefore, this 23rd day of December, 1957:

ORDERED that Sumner G. Whittier, Administrator of Veterans Affairs, shall be and is hereby substituted as a party

defendant for Harvey V. Higley, Administer of Veterans Affairs.

CONSENTED To:

/s/ Edward M. Curran
Judge

/s/ Robert J. Asman
ROBERT J. ASMAN
Assistant United States Attorney

**Order Denying Motion for Summary Judgment by Plaintiffs
and Intervenor. Filed January 9, 1958**

This case having come on for hearing upon plaintiffs' motion for summary judgment and determination of amount of taxable costs, litigation expenses and attorney's fees to be paid therefrom and the Court having considered said motion and memoranda in support and in opposition thereto and all of the pleadings, affidavits and exhibits herein, and it appearing to the Court that plaintiffs are not entitled to summary judgment, it is by the Court this 8th day of January, 1958,

ORDERED that plaintiffs' motion be and the same is hereby denied.

/s/ Edward M. Curran
Judge

**Motion by Plaintiffs and Intervenor to Consolidate Cases for
Trial. Filed April 24, 1958**

Come now the plaintiffs in the above named Civil Actions and move the Court to consolidate, for pre-trial and trial, the three above entitled actions and, for reasons therefor, state that the above actions involve common questions of law or fact pending before the Court and for other reasons

fully set forth in the Memorandum of Points and Authorities in Support of Motion for Consolidation attached to this Motion.

/s/ John T. Koehler

JOHN T. KOEHLER

*Attorney for Plaintiffs and
Plaintiff-Intervenors*

1039 Investment Building
Washington 5, D. C.

Order Consolidating Cases. Curran. J. Filed May 28, 1958

Upon consideration of the plaintiffs' motion to consolidate the above three captioned cases for pretrial and trial and the Memorandum of Points and Authorities in support thereof, as well as the Memorandum of Points and Authorities in opposition thereto, and after hearing oral argument of counsel for plaintiffs and defendants, it is this 28th day of May, 1958,

ORDERED, ADJUDGED and DECREED:

That Herman L. R. Emmet, Jr., on behalf of himself and all others similarly situated, plaintiff, v. Harvey V. Higley, et al, defendants, and Willard Van Valkenburgh, et al, plaintiff-intervenors, Civil Action No. 5658-55; and Robert H. Mabbutt and Robert R. Johnson, Suing for themselves and all persons similarly situated, plaintiffs, v. United States of America, defendant, Civil Action No. 1032-58; and James A. Deering, on behalf of himself and all other similarly situated, plaintiff, v. United States of America, defendant, Civil Action No. 1018-58, shall be and are hereby consolidated for pretrial and trial.

/s/ Edward M. Curran
Judge

SEEN:

/s/ E. Riley Casey

Assistant United States Attorney

Pretrial Order, Filed June 20, 1958

UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA

Civil Action Nos. 1018-58
1032-58
5658-55

EMMET, *et al.*, Plaintiff,

v.

HIGLEY, *et al.*, Defendant.

June 20, 1958

PRETRIAL PROCEEDINGS

STATEMENT OF NATURE OF CASE:

The issues are sufficiently covered by the pleadings and pretrial statements.

STIPULATIONS:

Counsel for P and for D stipulate and agree to the stipulations as requested by P in Ps pretrial statement of the cases as consolidated same being numbered 1 thru 6 inclusive as amended, the amendments being noted by counsel for the parties by their initials placed in the margin. Ps request No. 7 is not agreed to.

Counsel for P and D stipulate that the figures with respect to the named Ps and Intervenor outlined in Ds pretrial memorandum beginning at p. 3 are true and correct.

/s/ F. DICKINSON LETTS
Judge

Plaintiffs' Pretrial Statement, Filed June 20, 1958

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STIPULATIONS

1. On behalf of the members of the armed services who applied for the protection of Article IV of the Soldiers' and Sailors' Civil Relief Act of 1940, 54 Stat., 1183, 50 U.S.C.

App. (1940 ed.) § 540, promissory certificates of the United States were issued to the commercial life insurance companies involved, as security for the payment of unpaid premiums and interest.

2. Several thousand veterans of the armed services are similarly situated to the named plaintiffs and intervenors in these cases.

3. Approximately 8440 members of the armed services who received the protection of the Act, permitted the aforementioned commercial life insurance policies to lapse after their separation from the services, with the result that the Government was required to pay to the aforesaid commercial life insurance companies approximately \$1,642,000 for their unpaid premiums, with interest, on said policies, after first being credited with the cash surrender value of said policies.

4. By withholding National Service Life Insurance dividends and duly awarded disability compensation from several thousand former members of the armed services who had received the benefits of said Act, the Veterans' Administration endeavored to reimburse the United States administratively for the net amount the Government was required to pay said commercial life insurance companies.

5. The average amount of the money thus collected from each of said former members of the armed services was approximately \$195 and the total amount thus collected was approximately \$1,642,000, and this money as collected was placed in the Soldiers' and Sailors' Civil Relief Revolving Fund where it was merged with monies appropriated to that Fund by Acts of Congress and then by other Acts of Congress treated generally as Government Funds.

6. By the Second Supplemental Appropriation Act, 1953, approved March 28, 1953, 67 Stat. 16, and the Independent Offices Appropriation Act, 1955, approved June 24, 1954, 68 Stat. 292, \$1,500,000 in the Soldiers' and Sailors' Civil

Relief Revolving Fund was carried to the surplus fund of the Treasury. There is presently in the Soldiers' and Sailors' Civil Relief Revolving Fund approximately \$446,000.

Motion in Consolidated Cases by Plaintiffs and Intervenor for Temporary Restraining Order, with Supporting Affidavit of John Geyer Tausig, Filed August 5, 1958

Pursuant to Rule 65(b) of the Federal Rules of Civil Procedure, the plaintiffs move this Court for a temporary restraining order, without notice to the defendants, restraining defendant, Sumner G. Whittier, Administrator of Veterans Affairs:

- (a) from taking or continuing to take any steps to carry out the provisions of H. R. 9369, which on August 1, 1958, was signed by the President and became Public Law No. 85-586 of the 85th Congress, Second Session;

because it clearly appears from the specific facts set forth in the affidavit of John Geyer Tausig, filed herein, that immediate and irreparable injury, loss and damage will result to plaintiffs from the unlawful acts of that defendant, before notice can be served and a hearing had on this motion.

BUTLER, KOEHLER & TAUSIG

By

JOHN GEYER TAUSIG

.....
NATHANIEL F. BEDFORD

.....
LAWRENCE A. SCHEI

*Attorneys for Plaintiffs and
Intervenor*

1039 Investment Building
Washington 5, D. C.

Affidavit

John Geyer Tausig, first being duly sworn under oath deposes and states:

That he is one of the attorneys for the plaintiffs herein; that on August 1, 1958, the President of the United States signed H. R. 9369, which thus became Public Law No. 85-586 of the 85th Congress, Second Session; that the provisions of said Public Law are as follows:

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Administrator of Veterans' Affairs is hereby authorized to make refunds, *without interest*, which are due on account of amounts collected by the United States Government by offset or otherwise from persons who made valid application for and were legally entitled to the protection of Article IV of the Soldiers' and Sailors' Civil Relief Act of 1940, as it existed prior to the amendments of October 6, 1942. No refund shall be made pursuant to this Act unless application therefor is made to the Veterans' Administration, within two years after the date of enactment of this Act and refund hereunder shall not be denied by reason of any other statutory time limitations, judgments heretofore rendered, or any other technical defense.

"SEC. 2. The Soldiers' and Sailors' Civil Relief Fund may be used by the Veterans' Administration for making refunds pursuant to this Act and there is hereby authorized to be appropriated such additional sums as may be necessary to carry out the purposes of this Act.";

that in *United States v. Plesha*, 352 U.S. 202, it was determined that the collections mentioned in H.R. 9369 were made without legal justification, for the Soldiers' and Sailors' Civil Relief Act of 1940, as it existed prior to the amendments of October 6, 1940, did not, as the defendant alleged, impose an obligation on the persons receiving the protection of Article IV thereof to reimburse the Govern-

ment for that protection; that your deponent has been informed and believes that in order to carry out the provisions of the above-quoted Public Law, the defendant, Sumner G. Whittier, Administrator of Veterans' Affairs, has or is about to send notices to the veterans involved advising them that in order to obtain the refunds authorized by the Act, they must make claim therefor within two years on the form enclosed with the notice, and that the form contains a provision that the claim for and receipt of the authorized refunds constitutes a waiver and release of any claim against the United States for interest, on the amounts collected to reimburse the Government for the alleged indebtedness arising out of the aforementioned protection; that as shown by the stipulations entered into at the pretrial of these consolidated cases, the defendants made said collections from several thousand veterans, including all of the named plaintiffs herein, by withdrawing dividends, admittedly owing to those veterans on National Service Life Insurance contracts with the United States, from the permanent trust fund known as the National Service Life Insurance Fund, and applying said dividends to the alleged indebtedness of said veterans arising out of the aforementioned protection; that as more fully shown in the memorandum of points and authorities filed in support of the motion for a temporary restraining order, the named plaintiffs and the several thousand similarly situated veterans are entitled under the provisions of their National Service Life Insurance contracts with the United States to interest at the rate of 3 per cent per annum on the dividends withheld from them, from the date said dividends were withheld to the date they are paid, and the attempt to require them to waive their claim to interest in order to obtain the dividends is at least, an arbitrary, and at most, an unconstitutional interference with their contractual rights, as well as an endeavor to interfere with the jurisdiction of this Court to determine after a trial on the merits that they are entitled to a judgment for said interest; and

your deponent further states that to permit the Administrator of Veterans' Affairs to make the refunds authorized by the above-quoted Public Law, with or without the waiver and release of the aforementioned claim for interest, would result in further immediate and irreparable injury, loss and damage to the named plaintiffs herein, because the refunds to the several thousand former veterans similarly situated to the named plaintiffs, constitute monies which, for all practical purposes, had been restored to the permanent trust fund known as the National Service Life Insurance Fund, as a result of the work of the named plaintiffs, and the making of the refunds would interfere with the jurisdiction of this Court to determine after a trial on the merits that the named plaintiffs are entitled to have the defendants pay from the recovered trust funds and prior to distribution thereof the plaintiffs' litigation expenses and attorneys' fees and that said litigation expenses and attorneys' fees are to be borne proportionately by each of the several thousand similarly situated veterans who are the beneficiaries of the work of the named plaintiffs.

JOHN GEYER TAUSIG

**Affidavit of David A. Turner in Opposition to Motion.
Filed August 15, 1958**

DISTRICT OF COLUMBIA, SS.:

Personally appeared before, the undersigned authority for administering oaths, David A. Turner, of Washington, D. C., who, upon being duly sworn, deposes and says:

My name is David A. Turner and I am employed in the Office of the General Counsel, Veterans Administration, as Associate General Counsel for Legal Services. I have been continuously employed in the Office of the General Counsel of the Veterans Administration since March 1, 1946, and, incident to my position, I have general knowledge of the facts concerning the administration of the Soldiers' and

Sailors' Civil Relief Act of 1940, and of the administrative action proposed to be taken with respect to Public Law 85-586.

As to the type of application to be supplied to persons affected by Public Law 85-586, I can state that while the precise wording of the application form has not been determined, responsible officials have agreed that it will read substantially as follows:

"I hereby apply, pursuant to Public Law 85-586, approved August 1, 1958, which is set forth in full below, for a refund of all amounts collected by the Government from me by offset or otherwise."

It is contemplated that Public Law 85-586 will be quoted in full, without comment, on the form of application. It is not now, and never has been, contemplated that the applicant be required to waive any claim which he may have against the United States as a condition to the refund authorized by Public Law 85-586. It is the purpose of responsible officials of the Veterans Administration to comply with the provisions of Public Law 85-586 as clearly set forth therein and as amplified by Report No. 1862 of the Committee on Labor and Public Welfare, United States Senate, to accompany H.R. 9369, a copy of which is attached hereto.

Contrary to the statement appearing in the affidavit of John Geyer Tausig, contracts of National Service Life Insurance contain no provision allowing interest at the rate of 3 per cent per annum, or at any other rate, on dividends "withheld" from insureds.

Funds made available by Public Law 85-586 for payment of refunds have not "for all practical purposes" or any purpose, or as a matter of fact, been restored to the permanent trust fund known as the National Service Life Insurance Fund, and the enactment of Public Law 85-586 was not supported by plaintiffs and intervenors or their

attorneys, but, on the contrary, was strenuously opposed by the named plaintiffs' attorneys.

/s/ David A. Turner
DAVID A. TURNER

**Memorandum Granting Preliminary Injunction. Youngdahl, J.
Filed August 15, 1958**

The present motion asks the Court to enjoin the complete payment of funds to veterans under the Act of Congress Public Law No. 85-586 enacted August 1, 1958. The circumstances giving rise to the present motion are as follows:

Article IV of the Soldiers' and Sailors' Civil Relief Act of 1940 provided a plan under which men inducted into the armed forces would continue to receive the protection of previously purchased commercial life insurance while in service without paying premiums. Insurance companies were required to keep the policies of servicemen who elected to come under the Act in effect until one year after their military service ended, even though these men made no further payments. The Government assured the insurance companies that the premiums would eventually be paid by giving its promissory certificates to the companies. Veterans, once separated from service, could elect to pay the back premiums, with interest, and keep their policies in force, or allow them to lapse. Over eight thousand veterans chose the latter course and the Government was forced to indemnify the insurance companies for the unpaid premiums due during the veteran's time in service.

The Government then took the position that it was entitled to be reimbursed from the individual veterans for the money it was forced to pay by reason of the veteran's action. It deducted from other benefits due the veteran the amount of premium paid on the veteran's behalf.

On behalf of a few veterans an action was started in the Northern District of California and the Southern District

of New York to determine the Government's right to reimbursement. A stipulation was entered in the New York action agreeing that it would be governed by the decision of the Supreme Court in *United States v. Plesha*, 352 U.S. 202 (1957), the California case.

The Supreme Court held that the Government was not entitled to be reimbursed. Some eight thousand veterans from whom the Government had already deducted veterans benefits were affected by this decision and entitled to refunds. Since the statute of limitations was about to run, the attorneys in the *Plesha* case attempted to get a stipulation from the Government that it would be governed by *Plesha* with respect to claimed refunds of other veterans. This the Government refused.

As a result, there were filed three class actions, now consolidated before this Court, on behalf of individual veterans and others so situated. All attorneys who have participated in any of the above cases are also before the Court. In these actions the complaint asked for the amount deducted, 3% interest on dividends left on deposit in the National Service Life Insurance trust fund, and attorneys' fees.

In 1958, at the behest of the Government, Congress passed the Act mentioned above, authorizing the payment of the previously deducted premium payments, without interest, to veterans in the situation of *Plesha*. This rendered moot one of the issues in the class action still pending and left remaining only the questions of interest and attorneys' fees.

The injunction prayed for is only with respect to attorneys' fees.

Counsel for plaintiffs allege that should the Veterans Administration pay to all veterans the money appropriated in the statute, and a court later deem it fitting to award them attorneys' fees, the fund will have been dissipated

and recovery of their fees will be impossible. Thus, they allege, there will be irreparable injury.

It appears clear to the Court that this is indeed the situation. Any fee to be awarded by a court will be drawn from the fund gained by virtue of the attorneys' efforts. *Washington Gas Light Co. v. Baker*, 90 App. D.C. 98, 195 F. 2d 29, 33 (1951). No action against the United States or other remedy would be available to the attorneys should this fund be dissipated beforehand.

But even if this be the case, it is necessary that there be "enough to substantiate plaintiff's claims so as to move the court in the exercise of a sound discretion to intervene by its process," pending outcome of the main action. *Pang-Tsu Mow v. Republic of China*, 91 App. D.C. 324, 328; 201 F. 2d 195 (1952) cert. den. 345 U.S. 925 (1953). The Court has, therefore, examined with some scrutiny the merits of this aspect of the case.

The leading case on this question is *Sprague v. Ticonic Bank*, 307 U.S. 161 (1938). Petitioner in that case had established, by means of a lawsuit, her claim to a lien on the proceeds of certain bonds to the amount of the trust funds she had deposited with the bankrupt Ticonic Bank. Her attorneys argued that her case had, by the operation of *stare decisis*, established the claims of fourteen other trust claimants in similar positions and, therefore, the measurement of attorneys' fees should be on the basis of the sum total of the fifteen trusts, all of which had benefited and should bear the cost of the initial suit. The Supreme Court held that the District Court had the power to award the attorneys' fees requested. The Court said, "Whether one professes to sue representatively or formally makes a fund available for others may, of course, be a relevant circumstance in making the fund liable for his costs in producing it. But when such a fund is for all practical purposes created for the benefit of others, the formalities of the litigation—the absence of an avowed

class suit or the creation of a fund, as it were, through *stare decisis* rather than through a decree—hardly touch the power of equity in doing justice as between a party and the beneficiaries of his litigation.”

The above language was quoted and followed in *Washington Gas Light Co. v. Baker, supra*, where the plaintiff had brought an action protesting certain rate increases. Plaintiff was successful in having the rate increase set aside. Although the award to the individual plaintiff was very small, the total amount of the refund was very substantial. The Court, following the *Sprague* case, permitted allotment of attorneys' fees on the basis of the entire fund acquired and not only on the sum gained by the successful plaintiff. The Supreme Court of the United States has stated the reason for the rule and its salutary character. “Such a rule of practice * * * is absolutely essential to the safety and security of a large number of persons who are entitled to the protection of the law—indeed, stand most in need of it—but who are incompetent to know when they are wronged, or to ask for protection or redress.” *U. S. v. Equitable Trust Co.*, 283 U.S. 738, 744 (1931).

The Court is aware that the situation in the case at bar is somewhat different from that presented in the cases cited above. Here there is the intervention of an Act of Congress granting the repayment to the veterans. This statute was, however, instigated in some degree by the actions of the plaintiffs in the cases here.

Further, there is the issue as to whether there is any clearly defined fund which may be traced to these lawsuits from which attorneys' fees can be granted. These questions the Court need not decide and upon them the Court expresses no opinion. It is enough to decide, as the Court does, that there is a substantial question on the merits of the case with respect to the awarding of attorneys' fees.

The exercise of the court's equity jurisdiction “is a matter of sound judicial discretion, in the exercise of which the

court balances the conveniences of the parties and possible injuries to them according as they may be affected by the granting or withholding of the injunction." *Yakus v. United States*, 321 U.S. 414, 440 (1944). The Court notes that the instant case is on the ready calendar and is set for trial early this fall. Balancing the equities of the case, and taking into consideration the precept that the judiciary should exercise great caution before restraining governmental action, the Court is of the opinion that the temporary injunction should be granted.

The motion is granted enjoining the Veterans Administration from disbursing more than 90% of the payments authorized by Public Law 85-586. This injunction is to be in effect until the final determination of this suit, or until a further order of the court.

This memorandum may be considered specific findings of fact and conclusions of law.

Counsel will present the appropriate order.

/s/ LUTHER W. YOUNGDAHL

August 15, 1958

Preliminary Injunction. Youngdahl, J., Filed August 19, 1958

The Court having denied plaintiffs' motion for a temporary restraining order without notice to the defendants, restraining defendant, Sumner G. Whittier, Administrator of Veterans Affairs, from making complete payment of funds to the veterans entitled thereto under the provisions of the Act of Congress of August 1, 1958, Public Law No. 85-586 of the 85th Congress, Second Session, and having set down for hearing at the earliest possible time plaintiffs' motion for a preliminary injunction for the same relief and, with the consent of all parties concerned, having considered plaintiffs' motion for a temporary restraining order as a motion for a preliminary injunction, and having heard oral argument thereon by

counsel for plaintiffs and defendants, and having considered the memorandum of points and authorities and affidavit in support thereof and the memorandum of points and authorities and affidavit in opposition thereto, and having filed MEMORANDUM, FINDINGS OF FACTS AND CONCLUSIONS OF LAW, entered by the Court on August 15, 1958 it is this 19 day of August, 1958,

ORDERED, ADJUDGED AND DECREED:

1. That the defendant, Sumner G. Whittier, Administrator of Veterans Affairs shall be and is hereby enjoined from refunding to any claimant more than 90% of the amount which Public Law 85-586 of the 85th Congress, Second Session authorizes the Administrator of Veterans Affairs to refund to said claimant.

2. This preliminary injunction shall remain in full force and effect until the final determination of the suits in the above captioned civil actions, or until the further order of this Court.

/s/ LUTHER W. YOUNGDAHL
Judge

SEEN:

/s/ ROBERT J. ASMAN
Assistant U.S. Attorney for the
District of Columbia

Excerpts from Transcript of Proceedings, October 20-22, 1958

[pp. 2-3]

PROCEEDINGS

The Court: No. 5658-55 of this District, Emmet versus Higley and others, with which are indicated Nos. 1032-58, Mabbutt versus United States, and No. 1018-58, Deering versus United States. Are you ready for trial?

Mr. Tausig: Yes, Your Honor.

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STIPULATION OF COUNSEL

May I state for the record that I have been authorized by Mr. Asman, Assistant United States Attorney, who represents the defendants, that for the purposes of saving the time of the Court the defendants in each case have agreed to stipulate that if the attorneys were called upon, that it, the attorneys representing the plaintiffs and intervenors, were called upon to testify, with respect to matters set forth in the affidavits that have been heretofore filed with this Court and which will be brought up to date today by the filing of additional affidavits with respect to services and disbursements, that on direct examination they would testify as set forth in the affidavits; that therefore there need not be direct examination on those subjects by the plaintiffs' attorneys; but that the defendants reserve the right to cross-examine and also reserve the right to object to such testimony as they may claim to be irrelevant and immaterial in this case.

Mr. Asman: That is exactly correct, Your Honor.

The Court: Very well.

Mr. Asman: Making it clear, of course, that whatever grounds we have for objection, that that right be reserved at the proper time for it to be made.

The Court: Very well.

OPENING STATEMENT IN BEHALF OF PLAINTIFFS

* * * * *

[p. 30]

OPENING STATEMENT IN BEHALF OF DEFENDANTS

* * * * *

[p. 39]

The Court***

Now first will you, perhaps immediately upon recess—which will occur now—get together and see if you can

agree on some means of presenting what you agree on with respect to the fact side of the case. Right while you are here and you are all together, I would like you to see what you can do on that, and then advise me on the record after we resume.

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[pp. 42-43]

Mr. Asman: May it please the Court, with respect to your suggestion before the luncheon recess, counsel conferred well into the lunch hour and have agreed that the statement that is found in the defendants', in our, three briefs, trial briefs, can be stipulated with amendments that we made over the lunch hour. Now, Your Honor, as I understand the stipulation—

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[pp. 44-45]

The Court: In other words, the sum and substance of this is that what you are about to read now you do agree to, but either one of you may add anything further in the way of evidence concerning factual matters, if either one of you desires to offer it. Is that the idea?

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[pp. 46-52]

Mr. Asman: I am referring now to the trial brief facts in Emmet against Whittier, as amended, which shall as read, if the Court please, constitute a stipulation between the parties, as has been suggested and as explained by the Court in its understanding of the stipulation:

“This is a purported class action filed December 30, 1955. The thrust of the complaint is directed to the mandamus of the named defendants to require them to pay the plaintiff and others similarly situated sums the Veterans Administration collected from them by

offset against National Service Life Insurance special dividends and certain gratuitous V. A. benefits on account of claimed indebtednesses arising by virtue of the guaranty of the veterans' commercial insurance policies by the Veterans Administration.

"The Veterans Administration extended the protection of the Soldiers' and Sailors' Civil Relief Act of 1940, 50 U. S. C. Appendix 540-554, to qualified service personnel applying therefor, by guaranteeing the payment of premiums on their commercial life insurance policies. In 1942 the Act was amended" * * * "to provide, among other things, that the amount paid by the United States to an insurer on account of applications approved under the provisions of the said act, as amended, shall become a debt due the United States by the insured on whose account payment was made. 56 Stat. 775.

"The Administrator of Veterans Affairs concluded that the Government was entitled to reimbursement for losses sustained by it on account of the guaranty of premiums on the commercial insurance policies on applications submitted under the 1940 Act as well as under the Act as amended in 1942. Decisions of the Administrator of Veterans Affairs Nos. 513, March 1, 1943, and 742, April 1, 1947. Collections were made by demand, by offset against National Service Life Insurance special dividends, by offset against compensation and other gratuitous V. A. benefits and by suit. The sums collected were deposited in the Soldiers' and Sailors' Civil Relief Fund and thereafter transferred to the surplus of the Treasury by acts of Congress.

"In December 1955, when the present action was filed, preponderance of the judicial decisions on this point sustained the Administrator's view."

And there is a footnote at this point—

“See, for example, Hendler against the United States, 225 Fed. 2d 106 (Circuit Court of Appeals for the 10th Circuit); United States against Nichols, et al, 105 Fed. Supp. 543 (Northern District of Iowa), appeals dismissed, 202 Fed. 2d 956, 958 (Circuit Court of Appeals for the 8th Circuit); and Morton against the United States, 113 Fed. Supp. 496 (Eastern District of New York), which are reported decisions favoring the Administrator’s view.”

Now continuing with the text:

“However, on January 14, 1957 the Supreme Court (three justices dissenting) concluded, in the Plesha case arising in the Northern District of California, that the veteran Plesha and James Mabbutt and Myron Kern, the parties therein, were not obligated to reimburse the Government and that they were entitled to recover the special dividend which had been offset by the Veterans Administration.”

I will read now this second footnote, as amended:

“The House Veterans Committee, referring to the Supreme Court’s decision, stated that refunds would constitute a ‘windfall’ for the 8,440 potential claimants.”

That is cited as House Report 491, 85th Congress, 2d Session, page 2. Now continuing with the text, the case there is cited, United States versus Plesha, 352 U.S. 202.

“Plesha was not a class action and, although certain other actions have recently been transferred here and consolidated with the instant action for purpose of trial, Plesha is still pending in the Northern District of California.

"Thereafter plaintiff and intervenors urged that in the light of the Supreme Court's decision mandamus should issue and a motion for summary judgment was filed wherein additional relief was sought, that is, the allowance of attorneys' fees and costs of litigation. Plaintiff's and intervenors' motion for summary judgment was overruled.

"Following the Supreme Court's decision, the Veterans Administration concluded not only that they would refund sums collected from veterans who had justiciable claims but that they would also refund sums collected in cases where recovery would be barred by res judicata or other valid defenses. See Senate Report 1862, 85th Congress, 2d Session, page 2. However, the Comptroller General ruled (at B-101126, June 24, 1957) that there existed no funds from which refunds could be made by administrative action and that Congressional action was indicated. The President thereupon asked Congress for an appropriation to pay claims of all veterans from whom collections had been made under the 1940 Act.

"Counsel for plaintiff and intervenors wrote a letter dated August 2d, 1957 to the House Appropriations Committee, as appears on pages 734 to 736 of the hearings before the subcommittees of the Committee on Appropriations, House of Representatives, 85th Congress, 1st Session, the Supplemental Appropriation Bill, 1958.

"When the House Appropriations Committee refused to act, the Veterans Administration promptly sought authorizing legislation and H.R. 9369, 85th Congress, 1st Session, was introduced as a result of this request.

"Counsel for plaintiff and intervenors opposed the bill as drafted and sought amendments thereto which were not adopted in the act itself. After the legisla-

tion was eventually passed by both the House of Representatives and the Senate, they wrote the President, on July 24, 1958, urging its veto.

"Following this court's denial of Emmet's motion for summary judgment, counsel secured the transfer of the case of Deering against the United States from the Southern District of New York, and the case of Mabbutt against the United States from the Northern District of California, and the consolidation of these cases with Emmet for purposes of trial."

May I go back? I forgot a footnote, Your Honor. The footnote should be noted after this:

"Counsel for plaintiff and intervenors opposed the bill as drafted."

I think the footnote ought to go there, after "drafted," and the footnote words as follows:

"In the words of the Chairman of the House Veterans Committee:

"There has been one law firm in town that felt the bill should not be passed. Our committee took into consideration their views, disagreed with them, and reported the bill unanimously." (104 Daily Congressional Record, at page 4256.)

"H.R. 9369 was signed into law on August 1, 1958 (Public Law 85-586, 72 Stat. 487) and on August 5 counsel for plaintiff and intervenors approached the court seeking a temporary restraining order, without notice to defendants, as the records of this court will reflect. The court refused to grant this order but set the matter of a temporary injunction for hearing on August 11.

"On August 15 the court granted a temporary injunction to prevent the Administrator from paying out

more than 90 per cent of the payments authorized by Public Law 85-586, until determination of this suit or the further order of the court."

• • • • •
[pp. 52-58]

Mr. Asman: I now refer Your Honor to the statement of facts which appears in the Defendant's Trial Brief in the case of Deering against the United States, Civil Action 1018-58, which said facts shall be included in the stipulation heretofore entered into by counsel with respect to the Emmet case—

"This is a purported class action which was filed in the United States District Court for the Southern District of New York on December 30, 1955. It is an action for a money judgment against the United States arising out of an offset by the Veterans Administration of plaintiff's National Service Life Insurance special dividends. These dividends were offset to satisfy losses sustained by the United States in its guaranty of premiums on plaintiff's commercial insurance policy under the provisions of Article IV of the Soldiers' and Sailors' Civil Relief Act of 1940, 50 United States Code Appendix 540-554. The Veterans Administration extended the benefits of this Act to qualified service personnel who submitted proper applications. The Administrator of Veterans Affairs concluded that losses sustained because of its guaranty of premiums on such a policy became an indebtedness due the United States (Decisions of the Administrator of Veterans Affairs Nos. 513, March 1, 1943 and 742, April 1, 1947) and collections were made from individual veterans by offset against National Service Life Insurance special dividends, by offset against compensation and other gratuitous Veterans Administration benefits, and by suit. In plaintiff's case, collection was made by offset against National Service Life Insurance special dividends.

"In 1942 the Soldiers' and Sailors' Civil Relief Act was amended * * *"

• • • • •
Mr. Asman: Yes, Your Honor—

"to provide, among other things, that the amount paid by the United States to an insurer on account of applications approved under the provisions of said act as amended shall become a debt due to the United States by the insured on whose account payment was made. 56 Stat. 775.

"In December 1955, when the present action was filed, the preponderance of judicial decision sustained the Administrator's view.

"On December 6, 1956 plaintiff filed a petition to intervene in the case of Emmet against Higley (now Whittier) et al., Civil Action No. 5658-55, in the United States District Court for the District of Columbia, wherein he joined in the plaintiff's prayer for mandamus to compel refund of the funds offset. Although the plaintiff Deering has sought the allowance of attorneys' fees by a subsequent motion filed in the Emmet case, no prayer for the allowance of attorneys' fees has been lodged in this action.

"On January 14, 1957 the Supreme Court (three justices dissenting) concluded that the veteran Plesha and James Mabbutt and Myron Kern, the parties therein, were not obligated to reimburse the Government and that they were entitled to recover the amount of the special dividend which had been offset by the Veterans Administration. United States against Plesha, 352 U.S. 202.

"Thereafter the United States (July 1957) offered to agree to the entry of a judgment in the instant case in the Southern District of New York for the principal amount claimed by plaintiff, without interest, with

no provision to be made in the proposed judgment for members of the class. This offer was rejected.

"In March 1958 plaintiff Deering moved the United States District Court for the Southern District of New York to transfer this cause to the United States District Court for the District of Columbia. On April 16, 1958 the Court directed the transfer of this action to the United States District Court for the District of Columbia. The prayer for relief, which is for a money judgment, Interest and costs in this action, has not been amended. At no time has any veteran petitioned to intervene in this action."

I now refer Your Honor to the facts as set forth in the trial brief in the case of Mabbutt against the United States, Civil Action No. 1032-58, which facts shall constitute a part of the stipulation heretofore entered into with respect to the case of Emmet against Whittier—

"This is a purported class action which was filed in the United States District Court for the Northern District of California on January 13, 1956 on behalf of Robert H. Mabbutt and Robert R. Johnson. It is an action for a money judgment against the United States arising out of an offset by the Veterans Administration of plaintiffs' National Service Life Insurance special dividends. These dividends were offset to satisfy losses sustained by the United States in its guaranty of premiums on plaintiffs' commercial insurance policies under the provisions of Article IV of the Soldiers' and Sailors' Civil Relief Act of 1940, 50 U.S.C. Appendix 540-554.

"The Veterans Administration extended the benefits of this Act to qualified service personnel who submitted proper applications. The Administrator of Veterans Affairs concluded that losses sustained because of its guaranty of premiums on such policies

became an indebtedness due the United States (Decisions of the Administrator of Veterans Affairs Nos. 513, March 1, 1943, and 742, April 1, 1947) and collections were made from individual veterans by offset against National Service Life Insurance special dividends, by offset against compensation and other gratuitous Veterans Administration benefits, and by suit. In plaintiffs' cases, collection was made by offset against National Service Life Insurance special dividends.

"In 1942 the Soldiers' and Sailors' Civil Relief Act was amended to provide, among other things, that the amount paid by the United States to an insurer on account of applications approved under the provisions of said act, as amended, shall become a debt due to the United States by the insured on whose account payment was made. 56 Stat. 775. In January 1956, when the present action was filed, the preponderance of judicial decision sustained the Administrator's view.

"On November 20, 1956 plaintiffs filed a petition to intervene in the case of Emmet against Higley (now Whittier) et al., Civil Action No. 5658-55, in the United States District Court for the District of Columbia, wherein they joined in plaintiff's prayer for mandamus to compel refund of the funds offset. Although the plaintiffs have sought the allowance of attorneys' fees by a subsequent motion filed in the Emmet case, no prayer for the allowance of attorneys' fees has been lodged in this action.

"On January 14, 1957 the Supreme Court (three justices dissenting) concluded that the veteran Plesha and James Mabbutt and Myron Kern were not obligated to reimburse the Government and that they were entitled to recover the amount of the special dividends which had been offset by the Veterans Administration. United States against Plesha, 352 U.S. 202. Thereafter the United States (August 1957) offered to agree to

the entry of a judgment on the instant case in the Northern District of California for the principal amount claimed by plaintiffs, without interest, with no provision to be made in the proposed judgment for members of the class. This offer was rejected.

"In February 1958 plaintiffs moved the United States District Court for the Northern District of California to transfer this case to the United States District Court for the District of Columbia. On April 3, 1958 the court directed the transfer of this action to the United States District Court for the District of Columbia. The prayer for relief, which is for a money judgment plus interest, in this action has not been amended. At no time have any veterans petitioned to intervene in this action."

The Court: I take it that the statement as read, then, is approved by both to that extent.

Mr. Tausig: Yes, Your Honor.

The Court: All right. Now are you ready to proceed?

Mr. Tausig: Yes, sir. Just two preliminary matters. I also call your attention to the fact that there are stipulations of fact set forth in the approved pretrial statements by this Court.

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[p. 180]

Thereupon

Lawrence Allen Schei,

called as a witness by counsel for defendants and being first duly sworn, was examined and testified as follows:

Cross Examination

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[p. 184]

Q. In one of your affidavits I believe you indicate that the California Western States Life Insurance Company personnel and staff lent material assistance to you. Is that correct? A. That is.

* * * * *

[pp. 185-186]

Q. Did you receive any compensation for your services from them, Mr. Schei? A. Yes, I did.

Q. Did you receive that at the time on a contract basis, or do you have a contingent arrangement with them, or just what sort of an arrangement do you have with them?

A. At the time these deductions were made, the company was asked by these veterans to assist them in resisting the Government's position. The company indicated that they would be happy to do so, if they felt that there was any reasonable opportunity of getting the case before the courts, as far as jurisdictional problems were concerned, and if they felt there was any real chance of recovery.

After Mr. Plesha had spoken to me about the matter, they told me that they would possibly advance costs for Mr. Plesha, and that they wanted to know what my opinion was of the case; and if I would do some research and make the results available to them, they would pay me for my time, which they did.

Q. Do you care to disclose the amount of money that they paid you? A. I have no objection to doing it. I don't know whether I can remember the exact amount; but I think it was about \$300.

Q. Did you have any agreement or arrangement with any other insurance company, either in California or not, directly or indirectly for compensation for services in this matter? A. No, sir.

Q. Do you have any future arrangement with the California insurance company with respect to future fee in the event perhaps that this proceeding fails? A. I do not.

* * * * *

[p. 187]

Nathaniel Forrest Bedford,

called as a witness by counsel for defendants and being first duly sworn, was examined and testified as follows:

Cross Examination

* * * * *

[pp. 188-189]

Q. Have you had any dealings or any arrangements of any kind, possibly similar to the arrangement that Mr. Schei had with the Western States Life Insurance Company, with the New York Life Insurance Company? A. I would still like clarification. Are you referring, Mr. Asman, to the question of fees, or the payment of litigation expenses?

Q. That would be part of it, yes, Mr. Bedford. A. I have no such arrangement with any insurance company along those lines. I have had contact with the New York Life Insurance Company. I subpoenaed their records in the Hormel case, and put those records in evidence. And I have written to them at various times. But I have neither requested nor been offered any compensation or assistance other than I am entitled to by law.

Q. In other words, then, you don't have the same arrangement with New York Life Insurance Company that Mr. Schei had with the California Life Insurance Company—or even a similar arrangement. A. I told you, I have no arrangement for any kind of compensation or reimbursement with any insurance company.

* * * * *

[p. 194]

John Geyer Tausig,

called as a witness by counsel for defendants and being first duly sworn, was examined and testified as follows:

Cross Examination

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[pp. 196-197]

Q. Mr. Tausig, you have taken the position, have you not, before both houses of Congress, in the various committees, in the courts, that no attorney who is represented here in this suit today has ever received any compensation for his services in connection with the Plesha case? Isn't that correct? A. Well, that is an overstatement, sir. I have never made any such representation, personal representation, to any—or official representation to a congressman, that I can recall. If you are asking me whether I make that representation now, the fact is, as I know, our firm has never received any money of any kind, either for fees or disbursements in this case.

Q. But you have in fact represented that not only has your firm not received such compensation, but that neither firm or none of the firms involved has received that compensation? A. That is correct—and that was based on the information given to me by Mr. Bedford and Mr. Schei, which is borne out by their testimony here today.

• • • • •

[pp. 199-201]

Lawrence Allen Schei, recalled**Redirect Examination****By Mr. Tausig:**

Q. Mr. Schei, as I understood your cross-examination by Mr. Asman, you stated that you had received approximately \$300 from the California Western Insurance Company. Is that correct? A. That is correct.

Q. Now, sir, can you tell us whether or not you received that \$300 prior to the time that you brought suit, filed suit, for Paul E. Plesha? A. I am not absolutely sure, but I think I did.

Q. And will you tell us again, sir, for what services that compensation was paid? A. They wanted to know whether there was enough chance of success in this law suit, and they were particularly concerned with the jurisdictional question, to justify them in agreeing to advance costs. And I don't know that I directly testified to this; but they did agree to advance costs for the conduct of the Plesha litigation, without which agreement that litigation never could have been completed. They actually put up something in excess of \$2,000 in the way of costs, and paid for the printing of all the briefs; they paid for the filing fees, and so forth.

And they of course didn't have any idea what the size of their commitment would be in the beginning. But before undertaking that they wanted to know what my idea of their chances of success was. And of course I wanted to know about that, too. And they asked me to research some of these questions, which I did. I was paid for that work.

And if I didn't make this entirely clear, I would like to. I have no claim against them now for anything. I do not represent them in any respect at the present time. And I had an understanding with them in connection with this, that the acceptance of this money from them would not in any way bind me not to pursue any remedies that these clients might have against them, in the event they decided they wanted to pursue them.

• • • • •

[pp. 207-208]

William Arthur Howell,

being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Asman:

Q. State your full name, please. A. William Arthur Howell.

Q. What is your occupation, sir? A. Employed by the Veterans' Administration.

Q. In what capacity, sir? A. Acting chief of the Civil Relief Unit.

Q. Briefly, and very briefly, what does that unit do? A. Right now we are engaged in making refunds to the veterans in the case now at hand.

Q. Did you bring with you, at my request, certain figures which you have had authenticated? A. That is right, sir.

Mr. Asman: Would you please mark this as Government's No. 1 for identification.

(Veterans Administration statement of refunds received was marked for identification as Government Exhibit No. 1.)

By Mr. Asman:

Q. I show you what has been marked as Government's No. 1 for identification and ask you whether you can identify it. A. Yes, sir.

Q. What is it? A. It is a breakdown of the moneys that we have received or money that the Veterans' Administration has paid out to various insurance companies, that we got these refunds back from the veterans.

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[p. 208]

The Court: Government Exhibit 1 is admitted into evidence.

(The statement of refunds, heretofore marked for identification as Government Exhibit No. 1, was received in evidence.)

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Cross Examination

By Mr. Tausig:

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[p. 209]

Q. Mr. Howell, there is shown on this document, which is now Defendants' Exhibit 1 for identification—

• • • • •

Q. —that under the Soldier's and Sailors' Civil Relief Act of 1940 the Veterans' Administration collected a total of \$1,643,065.78. Is that correct? A. That is correct.

• • • • •

[p. 211]

Q. Now with respect to dividends, does that mean that the Government took from, or the Administrator of Veterans' Affairs, took from veterans that figure of \$962,048.83 from their National Service Life Insurance dividends? A. That was offset against the dividends.

Q. Now with respect to the figure of compensation, of \$64,292.23, does that mean, sir, that the Administrator of Veterans' Affairs took what otherwise would have been due the veterans for disability compensation? A. That money was withheld from compensation.

Q. Now with respect to "Other," can you tell us what that means, how that money was acquired? A. Well, that is a miscellaneous category. Some of it would be withheld from subsistence allowance due. A large portion of it is

money that we have reported, or rather an indebtedness reported, to the General Accounting Office as uncollectible, and they have effected recovery in various means that we don't know. They just simply would let us know when they made the recovery and how much it was, and we would credit it.

[p. 212]

Q. . . .

Now with respect to the amounts that you say are included in this \$24,177.20, that you say the Comptroller General's Office collected? Is that right? A. General Accounting Office.

Q. The General Accounting Office collected. A. That would be the majority of that figure. Q. And would that be possibly by the way of—can you tell us how that was done? A. No, sir, I can't, because once we report that to them, it is up to them to collect the money the best they can. I don't know how they go about it.

[pp. 214-215]

Frederick A. Lash,

being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Asman:

Q. State your full name, please, sir. A. Frederick A. Lash.

Q. And what is your occupation? A. I am an assistant comptroller in the Department of Insurance, Veterans Administration.

Q. Briefly in that respect what are your duties, sir? A. We handle the general allotment and advance funds to field stations where they are expended. It is not an operating

position. We provide accounting systems and things of that sort.

Q. In that respect, sir, are you acquainted with the Soldiers' and Sailors' Civil Relief Act revolving fund? A. Yes, sir.

Q. With respect to the Soldiers' and Sailors' Civil Relief Act revolving fund, where are the funds in fact which comprise that fund? A. They are with the Treasury Department.

Q. And with respect to the Soldiers' and Sailors' Civil Relief Act revolving fund, can you make a comparison between that fund and the National Service Life Insurance fund? A. Well there is a distinct difference. The National Service Life fund is a trust fund. The money in it has been derived from collections of premiums, interest, and interest on investments.

The Soldiers' and Sailors' Civil Relief fund is what is classified as a revolving fund. The money was all derived from appropriations. It was an appropriation account until 1951, I believe, when it was designated by Treasury as a revolving fund.

Q. Who are entitled to make claims upon the Soldiers' and Sailors' Civil Relief Act revolving fund? A. The insurance companies whose policies were guaranteed by the Veterans Administration.

* * * * *

[p. 216]

Cross Examination

By Mr. Tausig:

* * * * *

[pp. 216-219]

Q. Mr. Lash, with respect to your testimony, as I understood it you testified that the Soldiers' and Sailors' Civil Relief Act was with the Treasury Department. Is that correct? A. Yes, sir.

Q. Now isn't it a fact, sir, that the Administrator of Veterans' Affairs can draw on that fund as he sees fit? A. Yes, sir, to the extent that there are funds in the Treasury.

Q. Pardon? A. To the extent that there are funds in the Treasury Department.

Q. Right. So that is under his exclusive control, so far as withdrawals are concerned? A. Yes, sir.

Q. Now, sir, did you not also testify that all moneys in that fund were received by appropriations from Congress? A. Yes, sir; they were derived from appropriations.

Q. Are you acquainted with the fact, sir, that the Administrator of Veterans Affairs declared a special dividend in 1950 on National Service Life Insurance? A. Yes, sir.

Q. When that was declared are you also familiar with the fact that at that time the Administrator put some nine hundred thousand dollars in the Soldiers' and Sailors Relief revolving fund from dividends collected from National Service Life Insurance dividends? A. Yes, sir.

Q. So it didn't all come from appropriations, did it? A. When I say it was derived from appropriations, all the money originated. It was in the bill that payments were made under the appropriations. When the collection was made it was considered a repayment and restored to the fund.

Q. The fact is, however, sir, that \$962,048.83 was taken from the National Service Life Insurance trust fund and put into the Soldiers' and Sailors' Relief revolving fund? Isn't that correct, sir? A. Yes, sir, as a repayment.

Q. And also there was \$64,292.23 disability compensation taken from veterans and put into that relief revolving fund? A. Yes, sir, as a repayment.

Q. And also there were other collections made from veterans, \$24,177.20, and that was put in the revolving fund? A. Yes, sir—all repayments.

Q. And also there were some \$592,547.52 in cash obtained from veterans and put in this fund? A. Yes, sir—also repayments.

Q. Now, sir, your testimony was that this fund may only be used to pay claims of insurance companies? Is that correct? A. Yes, sir.

Q. Today is that correct, sir? A. No, sir, not today.

Q. And what purpose is it available for today? A. The public law which you have cited, 85—I won't attempt to remember it—permits the Veterans Administration—

The Court: You are referring to this one that was approved August 1, 1958?

The Witness: Yes, Your Honor.

The Court: Public Law 85-586.

Mr. Asman: I object to the relevancy of any testimony with respect to that law, Your Honor.

The Court: Overruled, exception allowed.

By Mr. Tausig:

Q. Now, sir, will you tell us what your understanding is with respect to the purposes for which the Administrator of Veterans Affairs may now use such money in that fund. A. He may use it to refund amounts that were collected from veterans who had applied under the 1940 Act and who had lapsed their policies, and where the VA had paid money to insurance companies and had subsequently collected from the veterans.

• • • • •

Plaintiffs' Exhibit 2, Senate Report 1862, 85th Cong., 2d Sess.

• • • • •

[p. 3]

COMMITTEE ACTION

Desiring to assure that refunds under the bill will be made promptly to all those entitled, the committee considered the inclusion of a direction in the bill that individual notice be given to potential claimants. This was determined to be unnecessary. It is the committee's view that, since the

purpose of the bill is to satisfy outstanding obligations of the Government heretofore established by the decision of the Supreme Court in the Plesha case, individual notification procedure can and will be followed without a specific statutory mandate. It is the committee's desire that as soon as practicable the Veterans' Administration notify each potential veteran claimant, or his heirs or legal representatives, of the right to file claims so that all concerned will have ample opportunity to make application within the specified 2-year limit.

The report of the Veterans Administration and other pertinent information now follow.

• • • • •
[p. 8]

The Assistant Attorney General, Civil Division, calls attention to the case of *Emmet v. Higley, et al.* (Civil Action No. 5658-55) pending in the United States District Court for the District of Columbia, a mandamus proceeding to compel payment into court of the amounts withheld from veterans on account of the purported indebtedness. He states that the purpose of that action in which numerous veterans have intervened is to recover costs, interest, and attorney's fees, that the complexion of the case daily becomes more serious in view of the increasing impatience of the court to anything that might be considered administrative hairsplitting which prevents substantial justice being done and because fully a year has gone by without the Government's compliance with the Plesha decision of the Supreme Court. * * *

• • • • •

Plaintiffs' Exhibit 3, House Report 1491, 85th Cong., 2d Sess.

[p. 9]

• • • • •

COMPTROLLER GENERAL OF THE UNITED STATES,
Washington, June 24, 1957

B-101126

Hon. H. V. Higley,
Administrator, Veterans' Administration.

Dear Mr. Higley:

• • • • •

[p. 11]

*** However, it may be that the Congress having regard for the wartime service rendered by the veterans to the United States and that any claim for such a refund prior to the Supreme Court's decision would undoubtedly have been rejected, might not wish to raise such technical defenses against them. ***

[p. 12]

Sincerely yours,

JOSEPH CAMPBELL,
Comptroller General of the United States.

—

Plaintiffs' Exhibit 4, Record in United States v. Plesha

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[p. 34]

REQUEST FOR ADMISSIONS

Plaintiff, Paul E. Plesha, hereby requests defendant, United States of America, within thirty (30) days after service of this request to make the following admissions for the purpose of this action only and subject to all pertinent

objections to admissibility which may be interposed at the trial:

That each of the following statements is true:

• • • • •
[p. 37]

11. That when plaintiff made application for such special dividend on his National Service Life Insurance as alleged in paragraph V of defendant's Answer herein, he became entitled, as a matter of right, to receive such dividend at such time and in such amount as might be determined in accordance with existing law, and rules and regulations of the Administrator of Veterans' Affairs.

• • • • •

13. That the deduction of Two Hundred Twenty-one Dollars Five Cents (\$221.05) made by the United States from such special dividend to which plaintiff became entitled was a denial pro tanto of plaintiff's request that he be paid such special dividend.

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[p. 38]

REPLY TO REQUEST FOR ADMISSION OF FACTS

State of California

County of San Francisco, ss.:

The United States of America, defendant in the above-entitled action, makes the following statement in response to the Request for Admissions served upon it by the plaintiff on February 12, 1951.

• • • • •

[pp. 38-39]

2. Defendant denies the truth of the matters set forth in Paragraphs 6, 11, 12, 13, 14 and 15 of the aforesaid request.

• • • • •

[pp. 39-41]

REPLY TO REQUEST FOR ADMISSION OF FACTS

State of California,
County of San Francisco, ss.

Now comes the defendant, the United States of America, and in response to plaintiff's Request for Additional Admissions, and subject to all pertinent objections which may be interposed upon the trial, says:

In answer to Request No. 16(a)——

It is true that the plaintiff took all necessary steps to procure payment by the Veterans Administration of the Special Dividend, payment of which commenced on to-wit, January 16, 1950, and except for his indebtedness to the United States on account of premiums advanced by it as set forth in defendant's Answer, would have been entitled, insofar as the Veterans Administration is concerned, to receive the sum of \$221.05, in addition to \$12.70, instead of having the former amount paid by applying it to his alleged indebtedness to the United States.

In answer to Request for Admission 16(b)——

It is true that, except for his indebtedness to the United States arising under the circumstances set forth in defendant's Answer, the plaintiff would have been entitled to receive a total of \$233.75 on account of such Special Dividend. In other words, National Service Life Insurance policies which had been in effect for the same length of time as plaintiff's, and which were taken out at the same insurance age on the Five-Year Level Premium Term plan, would have participated in the surplus available for distribution as special dividends to the extent of \$233.75, and the holders thereof would, if living on the date check in payment thereof was issued, have been entitled to receive such check in the absence of legal basis for refusing or withholding payment to the payee.

In answer to Request for Admission 17(a)——

It is admitted that plaintiff, prior to the filing of this suit, and on or about September 1, 1949, requested the Veterans Administration to make payment of Special Dividend on account of his National Service Life Insurance policy, which request of plaintiff the defendant complied with by applying the amount of \$221.05 to plaintiff's indebtedness to the Government, and by forwarding to the insured one check in the amount of \$9.95, and one check in the amount of \$2.75, as set forth in defendant's Answer.

In answer to Request for Admission 17(b)——

No, it is not true that the defendant, through the Veterans Administration and the Administrator of Veterans Affairs, has failed and refused to pay plaintiff more than the sum of \$12.70 on account of Special Dividend mentioned in defendant's Answer, for, as stated in Admission 17(a) above, the Veterans Administration paid said Dividend in full by applying \$221.05 thereof to his indebtedness to the United States, above referred to, and by issuing United States Treasury checks aggregating the sum of \$12.70, which were forwarded to the plaintiff.

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[pp. 41-43]

REQUEST FOR ADDITIONAL ADMISSIONS

Plaintiff, Paul E. Plesha, hereby requests defendant, United States of America, within thirty (30) days after service of this request to make the following additional admissions for the purpose of this action only and subject to all pertinent objections to admissibility which may be interposed at the trial:

16. Referring to the previous requests for admissions numbered 11 and 12 and the denials thereof:

(a) Is it not true that the plaintiff, when he furnished the information as alleged in paragraph 5 of defendant's

answer, took all steps necessary so that, except for the alleged indebtedness and charge mentioned in paragraphs 6 and 7 of the answer herein, he would have received, under the applicable statutes and regulations, the sum of \$233.75 as dividends on his National Service Life Insurance policy referred to in the complaint?

(b) Is it not true that, except for the alleged indebtedness and charge mentioned in paragraphs 6 and 7 of defendant's answer herein, plaintiff, Paul E. Plesha, was entitled as a matter of right to receive the sum of \$233.75 on or about January 24, 1950?

17. Referring to request for admissions numbered 13 and 14, and the denials thereof:

(a) Is it not true that plaintiff, prior to the filing of the complaint herein, and on or about September 1, 1949, requested defendant, in writing, through the Veterans Administration and the Administrator of Veterans' Affairs, to pay plaintiff the full amount of any special dividend to which he might be entitled?

(b) Is it not true that the defendant, through the Veterans Administration and the Administrator of Veterans' Affairs, has failed and refused to pay plaintiff more than the sum of \$12.70 on account of the special dividend mentioned in paragraph IV of defendant's answer herein?

[p. 43]

• • • • •
 ADDITIONAL WRITTEN INTERROGATORIES AND
 ANSWERS THERETO

To United States of America, Defendant, and to Chauncey
 Tramutolo, United States Attorney, Its Attorney:
 • • • • •

[pp. 48-50]

INTERROGATORY No. 32

Referring to the denial of our previous Request for Admissions No. 15, is it not true that prior to September 1, 1949, the Veterans Administration had publicly announced that persons who had taken out policies of National Service Life Insurance on or after October 8, 1940, and before December 31, 1947, and who had kept such insurance in force for at least three months could make application for a special dividend on such insurance?

ANSWER TO INTERROGATORY No. 32

Yes, on June 20, 1949, news item, copy attached, was released for publication.

VETERANS ADMINISTRATION INFORMATION SERVICE

EX. 4210 Br. 2741

(Copy)

Washington 25, D. C.

Immediate Release—Monday, June 20, 1949.

Payment of a \$2,800,000,000 (billion) special National Service Life Insurance dividend on approximately 20,000,000 (million) policies today was authorized by Carl R. Gray, Jr., Administrator of Veterans Affairs.

About 16,000,000 veterans who took out insurance during World War II will be eligible to receive the dividend. Amounts individual veterans will receive are not yet known, as individual calculations have not been completed.

Mr. Gray said that he "hoped distribution of the checks could be started sometime in January, 1950, and be substantially completed during the first half of 1950."

Generally, every veteran who took out NSLI and kept it in force for three months or more will be eligible for the dividend, Mr. Gray indicated. In cases where policyholders have died, the beneficiary of the policy, if the insurance was in force, or those shown to be entitled in case the insurance was lapsed, will receive the payment.

Mr. Gray strongly emphasized that veterans should not write V-A about their dividend, because letters will only cause the payment to be delayed. Special application blanks are now being prepared and it is hoped they can be printed in time to be available sometime in August in every post office, veterans service organization and V-A Offices.

The form is a 3-fold card upon which the veteran writes his full name, service number, insurance policy numbers and his address. He retains one-third of the card which contains the instructions, and mails the other two parts to the V-A, where the application part of the card is separated and the return acknowledgment portion mailed back to the veteran to inform him that V-A has received the application. Any letter writing, Mr. Gray reiterated, would only serve to delay processing the applications.

[pp. 51-52]

INTERROGATORY No. 35

Is it not true that when plaintiff and others who had carried National Service Life Insurance during the specified periods made such application for payment of such special dividend they became entitled to receive such dividend as a matter of right subject only to administrative processing?

ANSWER TO INTERROGATORY No. 35

No, policies in effect during the specified period could be held entitled to participate in the surplus available for distribution only after consideration of an application was completed by the Administrator or his subordinates. There were many circumstances which might diminish or destroy any right one might otherwise have had to receive payment of the special dividend.

INTERROGATORY No. 36

If the answer to the two preceding interrogatories or either of them is "No" or "It is not true" or the equivalent:

(c) When the Veterans Administration received such applications from plaintiff and others what, if anything, remained to be done or determined in order that such applicants might receive such special dividend or become entitled to receive same?

ANSWER TO INTERROGATORY No. 36

[pp. 53-54]

(c) Upon receipt of requested information from policyholders, or their successors in interest, the Veterans Administration caused a review to be made of all of an insured's records for the purpose of determining the insured's age at the time of issue of the policy, the number of months the policy was in force prior to its anniversary date in 1948, and any other facts pertinent to eligibility of the applicant, such as determination that the holder had not forfeited his right under § 812, 38 U.S. Code, misstated his age, procured reinstatement of the policy, or any benefits thereunder by means of fraud, or under circumstances creating rights in the Government to reimbursement (including determination of the existence of indebtedness on the part of the policyholder or beneficiary subject to offset against any dividends otherwise payable). Mathematical calculation of the exact amount payable as special dividend would then be made by multiplying the monthly participation by the number of months the policy was in force prior to its anniversary date in 1948, and by making any lawful deductions indicated. See copy of memorandum dated January 15, 1948.

INTERROGATORY No. 38

What determinations were made and what rules or regulations were promulgated by the Administrator of Veterans' Affairs concerning the declaration of a special

dividend on National Service Life Insurance prior to January 16, 1950? Please attach copies.

• • • • •
[pp. 94-96]

(Exhibit to Defendant's Answer to Interrogatory No. 38.)

§ 8.26 Dividends. A National Service life insurance policy shall participate in and receive such dividends from gains and savings and may be determined by the Administrator of Veterans' Affairs. Any such dividends shall be paid in cash except that at the written request of the insured they may be left to accumulate on deposit provided the policy is in force on a basis other than extended term insurance or level premium term insurance. Payment of dividends shall be without interest except when left to accumulate on deposit in accordance with the insured's written request. Interest on dividend accumulations will be credited annually at such rate as the Administrator may determine. Dividend accumulations and unpaid dividends shall not be available for the payment of insurance premiums except at the written request of the insured made before default in payment of a premium. Any unpaid dividend on a lapsed policy will be paid in cash to the insured, if living, otherwise to his estate. Dividend accumulations will be used in addition to the reserve on the policy for the purpose of computing the period of extended term insurance or the amount of paid-up insurance as provided in §§ 8.29(a) and 8.30, respectively. Upon maturity of the policy, any dividend accumulations not previously withdrawn and any unpaid dividends will be payable in cash under the policy.

(Sec. 602, 54 Stat. 1009, as amended; 38 U.S.C. and Supp. 802.)

§ 8.26a Special dividends. Any Special National Service life insurance dividend that may be declared shall be paid in cash only. Such special dividends shall not be accepted

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§ 8.26a Special dividends. Any Special National Service life insurance dividend that may be declared shall be paid in cash only. Such special dividends shall not be accepted

to accumulate on deposit. Unpaid special dividends shall not be available to pay premiums.

(Sec. 313, 60 Stat. 789; 38 U.S.C. 512d) (14 F.R. 2832, May 28, 1949.)

**Plaintiffs' Exhibit 5, House Hearings on Supplemental
Appropriations Bill**

[pp. 707-712]

Tuesday, July 30, 1957

SOLDIERS' AND SAILORS' CIVIL RELIEF

Mr. Thomas: The committee will please come to order.

We have the pleasure of having many friends from the Veterans' Administration with us again this morning.

I notice that we have our friend Mr. Kelsey, the Controller; Mr. Wells, the Assistant Budget Officer; Mr. Turner, the Director of the Litigation Service, Office of the General Counsel; from the Department of Insurance we have Mr. Gardner, the Deputy Insurance Director; and from the Department of Veterans' Benefits, Mr. Stone, Chief Benefits Director; Mr. Sweeney, Director of the Loan Guaranty Service; and Mr. Monk, the Controller, and also Mr. John Dervan, Legal Assistant, Loan Guaranty Division.

Is Commissioner Higley ill this morning?

Mr. Kelsey: He is away for a period of time.

Mr. Thomas: A meeting is hardly complete without him, but we will have to get along without him today.

Mr. Kelsey: He is not in the city.

Mr. Thomas: We want to discuss 2 or 3 things with you. We want to look over your loan-guaranty program and see how you are doing and then we want to go into a supplemental item that you have here.

We will take up the supplemental item first in House Document 213. You have an item of \$1,300,000 for soldiers' and sailors' civil relief. We will insert the language and explanation of the item in the House document at this point.

(The information follows:)

VETERANS ADMINISTRATION

"SOLDIERS' AND SAILORS' CIVIL RELIEF

"For an additional amount for 'Soldiers' and sailors' civil relief,' '\$1,300,000, to remain available until expended': *Provided, That the 'Soldiers' and sailors' civil relief fund,' as supplemented by this appropriation, may be used by the Veterans Administration for making refunds, without interest, which are due on account of amounts collected by the United States Government by offset or otherwise from persons who made valid application for and were legally entitled to the protection of Article IV of the Soldiers' and Sailors' Civil Relief Act of 1940, as it existed prior to the amendments of October 6, 1942: Provided further, That application for such refunds must be made to the Veterans Administration within two years after the date of enactment of this Act and shall not be denied by reason of any other statutory time limitations, judgments heretofore rendered, or any other technical defense.*"

Through this fund the Government guarantees payment of premiums on life insurance policies held by servicemen during their service and for 2 years subsequent to discharge.

This supplemental request results from a Supreme Court decision of January 14, 1957, that the Soldiers' and Sailors' Civil Relief Act of 1940, prior to its amendment in 1942, did not obligate the serviceman to reimburse the Government for premiums paid by the Government in cases where the policy was subsequently permitted to lapse. The principle of this decision is expected to obligate the Government to refund approximately \$1,642,000 to some 8,440 individuals from whom collections were made for Government-paid premiums on policies guaranteed under the act as it existed prior to amendment. The proposed provisions will enable refunds to be made administratively on an equitable basis.

Mr. Thomas: I notice here you have a deficiency item for 1958 "For an additional amount for 'Soldiers' and

Sailors' civil relief,' '\$1,300,000 to remain available until expended:'. ''

Then you have quite a bit of legislation attached:

Provided, That the 'Soldiers' and sailors' civil relief fund, as supplemented by this appropriation, may be used by the Veterans Administration for making refunds, without interest, which are due on account of amounts collected by the United States Government by offset or otherwise from persons who made valid application for and were legally entitled to the protection of Article IV of the Soldiers' and Sailors' Civil Relief Act of 1940, as it existed prior to the amendments of October 6, 1942: *Provided further*, that application for such refunds must be made to the Veterans Administration within two years after the date of enactment of this Act and shall not be denied by reason of any other statutory time limitations, judgments heretofore rendered, or any other technical defense.

That is legislation and I imagine the best thing for you to do is to go to your legislative committee—not that we have any objections to what you are doing here.

You might tell us about it in the first place, Mr. Gardner.

Mr. Gardner: This revolving fund was established to implement the provisions of article 4 of the Soldiers' and Sailors' Civil Relief Act of 1940, as amended, under which the Government guarantees premiums due on commercial life-insurance policies held by servicemen while they are in service and for 2 years after discharge.

Mr. Thomas: This goes back to World War II?

Mr. Gardner: World War II, and the act is still in existence.

Mr. Thomas: It includes the Korean boys also?

Mr. Gardner: Yes.

Mr. Thomas: It was generally thought when a chap went into the service and he had a civilian life-insurance policy, that that policy would become null and void if he went overseas. The purpose of the various Government insurance

policies for veterans was to take the place of those insurance policies that had been canceled, and also provide his beneficiaries with a Government policy. But in truth and in fact all civilian life-insurance policies were not canceled by virtue of service in the military of the United States.

Mr. Gardner: Some of them had the so-called war clause, and if they lost their lives as a result of military duty their policy would be null and void. The proceeds were payable if death occurred for any other reason.

Mr. Thomas: What percentage of civil life-insurance policies became null and void by virtue of military action?

Mr. Gardner: That would be something on which we could not possibly get the information.

Mr. Thomas: Would it be a third, a fifth, or one-tenth of the policies? What is a reasonable guess on it?

Mr. Evins: There must have been some information given on this subject at the time the act was passed.

Mr. Gardner: I would assume the only information available was the fact that when war became imminent many of the companies began to write a war clause in their insurance policies.

Mr. Thomas: Was not the war clause in most policies? Were they not in effect 5 or 10 years before war started? Was it not a common practice for the companies to write in that clause?

Mr. Gardner: It was a common practice dropped to some extent in the period of peace following World War II and it was revived as unrest occurred in Europe.

As enacted in 1940 the Soldiers' and Sailors' Civil Relief Act did not specifically provide for reimbursement by the serviceman for premiums paid by the Government when the policy was subsequently lapsed, but the Veterans' Administration construed the law as imposing such an obligation. As a result, indebtedness was set up against applicants on whose account payments were made by the Government, and collections were made against this supposed indebted-

ness. In 1942 the act was amended to specifically provide that amounts paid to the insurer by the Government would constitute an indebtedness against the insured.

SUPREME COURT DECISION

The Supreme Court of the United States in *U. S. v. Plesha et al.* (352 U.S. 202), decided January 14, 1957, held that the 1940 act, as distinguished from the 1942 amendments, did not impose an obligation upon the serviceman to reimburse the Government for premiums the Government was called upon to pay the insurance company. This decision created an obligation on the part of the Government to reimburse amounts collected from servicemen to cover payments to commercial insurance insurers incident to guaranties made pursuant to provisions of the original act (1940).

COLLECTIONS

Collections were made in approximately 8,440 such cases. The average amount collected was approximately \$195, resulting in potential claims for refund in the total amount of \$1,642,000. There is currently available in the soldiers' and sailors' civil relief revolving fund approximately \$446,000 of which it is estimated \$104,000 will be required for future claims of insurers, resulting in supplementary appropriation needs of \$1,300,000. It may be noted that this amount is less than the total of the amounts (\$1,500,000) which were transferred to surplus of the Treasury from the fund pursuant to the Second Supplemental Act, 1953, and the Independent Offices Appropriation Act, 1955.

Mr. Vursell: What was done in the Second Supplemental Act of 1953?

Mr. Gardner: I think at that time we had some \$900,000 in the revolving fund and \$500,000 was transferred to the miscellaneous receipts of the Treasury.

Mr. Wells: \$1 million went back in 1953 and \$500,000 in 1955.

SUPREME COURT DECISION

Mr. Evins: When the Court rendered its decision it imposed upon the Veterans' Administration an obligation to refund to the veterans the amount of the premium they had paid?

Mr. Gardner: The money we had collected from them.

Mr. Evins: You say that the Supreme Court imposed upon the Veterans' Administration the obligation to repay to the veterans the amount of the money you had collected from them?

Mr. Gardner: As a result of paying the companies.

Mr. Evins: At the time of the decision the collections had amounted to how much?

Mr. Gardner: The collections of the contracts coming under the Supreme Court decision had amounted to \$1,642,000.

Mr. Evins: Your amount in the revolving fund of \$446,000 would not be adequate, according to your statement, to take care of the situation?

Mr. Gardner: That is correct, sir. We have to have a small working balance in there because we have about 800 policies still under the protection of the act. Others are still coming under the protection of the act. We need a small working balance.

Mr. Evins: Does this insurance remain in effect as long as these men inducted in World War II period and the Korean war period remain in service?

Mr. Gardner: That is right, as long as they are in the service and 2 years thereafter.

Mr. Evins: What about those that are inducted at this time?

Mr. Gardner: If they have an insurance policy they can put it under the protection of the act.

Mr. Evins: But they are not given the gratuitous free insurance?

Mr. Gardner: That ended in 1942.

Mr. Evins: This applies only to the protection of the insurance which the servicemen themselves had outstanding at the time they went into the service?

Mr. Gardner: That is right. I do not believe we still have any cases which were put under the protection of the act prior to the 1942 amendment. There are none of those left.

Mr. Evins: There is a double obligation on the Veterans' Administration; one imposed by the statute and another imposed by the Supreme Court's decision?

Mr. Gardner: That is correct in a sense; yes.

Mr. Ostertag: If the Supreme Court based its decision on the 1940 act—and that is correct, is it not?

Mr. Gardner: That is correct.

Mr. Ostertag: Which was subsequently amended in 1942—and if the Supreme Court has determined that an obligation existed by virtue of their interpretation of the 1940 act, why do you need any supplemental authority in order to make these payments?

Mr. Gardner: I think Mr. Turner can probably answer that better than I from a legal point of view.

Mr. Turner: There are two reasons for that. The money which came in, from whatever source, was put into this revolving fund, but the revolving fund consists of money derived from collections with respect to policies which were not only under the 1940 act as to which the Veterans' Administration had always taken a position that there was a debt arising by operation of law, but also collections with respect to policies under the 1942 act which the Congress said created a debt.

The Supreme Court held in the Plesha case that the Veterans' Administration was wrong in holding that a debt existed with respect to the 1940 act. We submitted the matter to the Comptroller General after the Plesha decision as to whether or not the moneys in this revolving fund which were left there, amounting to \$446,000, could be used to pay these veterans back the money we had collected from them.

The Comptroller General ruled on June 24, 1957, in Decision No. B-101126 that that fund was not available for that purpose unless Congress said it should be available; that it was designed for other purposes than that. The Comptroller General also suggested that the entire matter be presented to the Congress in the form in which we now present it. I think that probably answers your question. If there are any further questions about it I would be glad to explain further.

Mr. Thomas: The Supreme Court held that where a veteran did not carry his policy through, or let it drop after you had collected this money, then you would have to return the premium? Was that the upshot of the opinion?

Mr. Turner: Mr. Chairman, here is exactly what it was. Here is a man who went into the service after the enactment of the 1940 act. He had a policy of life insurance for, say, \$5,000 issued to him by the New York Life Insurance Co., or some other commercial company. The military pay was low. He was not able to pay the premiums as they became due monthly or quarterly.

Mr. Thomas: Then the purpose of this act was to pay the premiums for him?

Mr. Turner: The purpose of this act was to guarantee the insurance company that those premiums would be paid if the man made application. The Government issued certificates to the insurance company in the amount of these premiums. Of course, they would tally them up each month, and issue a general certificate to each company. The provisions of the act were that settlement would be made after the man had terminated his service, 1 year after that, if he had not paid the insurance company.

Now, he could go in and pay the insurance company himself, those premiums, but if he did not pay then the Government had to pay.

Mr. Thomas: And all during that time you withheld from his pay the premiums?

Mr. Turner: Not from his pay. There were two ways we collected this money that we paid over to his insurance company a year or more after he got out of service. One was by direct collection, writing him a letter and saying, "You owe us so much money," and he would send us a check. The other way was to take it out of other benefits payable to him under veterans' laws. The principal benefit that was looked to for the purpose of effecting those offsets was the national service life insurance dividend.

Mr. Thomas: What did the Supreme Court hold?

Mr. Turner: The Supreme Court held we had no right to charge the insured for the moneys we had paid to the insurance companies. In other words, that this was in effect free insurance provided him by the Government.

Mr. Thomas. The Supreme Court did a little legislating there.

Mr. Turner. It apparently did. That has been our position all the time.

Mr. Thomas. Now you want some legislation to pay the money back?

Mr. Turner. The Supreme Court says we owe.

Mr. Thomas. Have you submitted this to the legislative committee?

Mr. Turner. I do not think so.

Mr. Thomas. Well, gentlemen, there is nothing urgent about it. Do you not think you had better submit this to the legislative committee? The Comptroller General has ruled that you cannot divest yourself from these funds without legislative action so I think the courteous thing to do would be to submit this to the legislative committee. After you do that and you have an understanding with them, then if you need our services come back to see us.

Mr. Jonas. What was the name of that case?

Mr. Turner. *U. S. v. Plesha* (352 U.S. 202).

Mr. Ostertag. Off the record.

(Discussion off the record.)

Mr. Thomas. If there are no further questions, we thank you very much. You made a very nice presentation.
[pp. 734-736]

STATEMENT OF JOHN T. KOEHLER REGARDING SOLDIERS'
AND SAILORS' CIVIL RELIEF FUND

The Committee is in receipt of a letter from the firm of Butler, Koehler and Tausig, regarding the soldiers' and sailors' civil relief fund, which will be made a part of the record at this point:

(The letter referred to follows:)

WASHINGTON, D.C., August 2, 1957.

HON. ALBERT THOMAS,

Chairman, Subcommittee on Independent Offices Appropriations, House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: Reference is made to proposed legislation, set forth in House Document No. 213, which would provide for a supplemental appropriation of \$1,300,000 for the soldiers' and sailors' civil relief fund and authorize the Veterans' Administration to use the fund, as supplemented, to make refunds, without interest, which are due on account of amounts collected by the United States Government by offset or otherwise from persons who made valid application for and were legally entitled to the protection of article IV of the Soldiers' and Sailors' Relief Act of 1940, as it existed prior to the amendments of October 6, 1942.

We requested an opportunity to appear before your subcommittee for the purpose of testifying with respect to this proposed legislation, but, understandably enough, in view of the pressure of time, were requested to submit instead a written statement for the consideration of the subcommittee.

Our interest in the proposed legislation arises out of the fact that in connection with the law firms of White, Harber,

& Schei, Sacramento, Calif., and Tonnele & Bedford, New York, N. Y., we have been engaged in litigation known as *United States v. Plesha* (25 U.S. Law Week 4088), decided by the United State Supreme Court on January 14, 1957; *Hormel v. United States* (United States District Court for the Southern District of New York, 132 F. Supp. 806); and *Emmet et al. v. Higley, Administrator of Veterans' Affairs et al.*, Civil Action No. 5658-55, United States District Court for the District of Columbia, which resulted in the request of the Veterans' Administration for the aforementioned legislation.

The facts which gave rise to the Plesha case and the Supreme Court's decision therein are as follows: Article IV of the Soldiers' and Sailors' Civil Relief Act of 1940 (54 Stat. 1183, 50 U.S.C. App. (1940 ed.) (sec. 540) provided a plan under which men inducted into the armed services would continue to receive the protection of previously purchased commercial life insurance while in the service without paying premiums. Insurance companies were required to keep the policies of servicemen who elected to come under the act in effect until after their military service ended even though these men made no further premium payments. The Government assured the insurance companies that the premiums would eventually be paid by giving its promissory certificates to the companies. Plesha and the interveners in his case had purchased commercial life insurance prior to the time they entered the military service and they invoked the benefits of the act. They made no further payments of premiums but their policies were kept in effect by Government certificates. After leaving the military service, they were notified by the Veterans' Administration that unless they paid back premiums with interest their policies would lapse. They allowed the policies to lapse and the Government paid the insurance companies the back premiums after first deducting the cash surrender value of the policies. Thereafter, the Government took the position that it had the legal

right to be reimbursed for these payments and it attempted to offset the amount it had paid on their commercial insurance, by withholding from them dividends declared on their national service life insurance policies. Plesha and the interveners in his case sought to recover the national service life insurance dividends withheld from them. The United States Supreme Court held that they were entitled to recover the dividends, because they had no statutory or contractual obligation to the Government to repay the premiums on their lapsed commercial life insurance.

The facts in the Hormel case are on all fours with the facts in the Plesha case. Prior to the Supreme Court's decision in the Plesha case, the United States District Court for the Southern District of New York rendered judgment in favor of Hormel and the interveners in that suit against the United States for the national service life insurance dividends that had been withheld from them, for the same reason that the dividends had been withheld from Plesha. By stipulation, the Government's appeal from the Hormel judgment was suspended, pending the decision of the Supreme Court in the Plesha case.

The plaintiffs and interveners in the Plesha and Hormel litigation are also interveners in the Emmet case. The facts in the Emmet case are on all fours with the facts in the Plesha and Hormel cases with the exception that the Emmet case is a class action on behalf of the plaintiff and all other similarly situated veterans against the Administrator of Veterans' Affairs and other officers of the Government, seeking mandatory injunction directing the defendants to pay the national service life insurance dividends and disability compensation, which were withheld from them, for the same reason the dividends were withheld from Plesha and Hormel. Although the Plesha decision, as a consequence of stare decisis, established the right of all other similarly situated veterans to recover the dividends and disability compensation withheld from them, that right

would have been forever barred by the applicable 6-year statute of limitations to approximately 6,000 veterans who were not parties to the Plesha and Hormel litigation, if the Emmet case had not been commenced on their behalf on December 30, 1955.

In the Emmet case there is now pending before the district court a motion for summary judgment in the form of a mandatory injunction directing the defendants to make payment to the plaintiff, interveners and all other similarly situated veterans of the amounts due them as alleged in the complaint and petitions in intervention, together with interest thereon at 6 percent per annum from the dates defendants illegally withheld said amounts from them; and there is also pending before the court a motion for a determination of the amount of taxable costs, litigation expenses and attorneys' fees to be paid, prior to distribution, from the aforementioned dividends and disability compensation to be received by all veterans who are represented in the class action. These motions are scheduled for hearing by the district court on August 28, 1957. A copy of the motion and a copy of the memorandum of points and authorities filed in support thereof are enclosed herewith. It is our belief that the memorandum clearly establishes the right of the plaintiff and interveners and all other similarly situated veterans to the judgment they seek, including interest, and also clearly establishes the authority of the district court to determine the amount of taxable costs, litigation expenses and attorneys' fees that are to be paid, prior to distribution, from the dividends and disability compensation to be received by all the veterans represented in the class action.

You will note that the proposed legislation would authorize the Veterans' Administration to make refund of amounts illegally withheld by the Government, without interest, which in our view of the matter, deprives the veterans of a relatively important right. On this point it is interesting to note that a ruling of the Comptroller General on this

matter (B-10126, dated June 24, 1957) shows that the amounts illegally withheld by the Government were, pursuant to acts of Congress removed from the soldiers' and sailors' civil relief fund and carried to the surplus fund of the Treasury and thus made available for the general purposes of the Government.

The Government is represented in the Emmet case by the United States attorney for the District of Columbia, and we, as counsel for the plaintiff, Emmet, the interveners and all other similarly situated veterans, have conferred with officials of his office and officials of the Veterans' Administration. As a result of our conferences, it was and is our understanding that even if funds are made available to the Veterans' Administration through supplemental appropriation, for the purpose of refunding the amounts illegally withheld from the veterans, no attempt would be made by the Government to make such refunds until the issues involved in the Emmet case have been finally resolved.

For the foregoing reasons, we believe that it is unwise and unnecessary to include a supplemental appropriation of \$1,300,000 for soldiers' and sailors' civil relief fund in the proposed legislation before your subcommittee. That is, we believe that the proper method of securing payment for the veterans involved is through the medium of a judgment in the Emmet case and a deficiency appropriation to pay that judgment. Moreover, we believe that that procedure will afford the veterans more adequate relief than the proposed legislation now before your subcommittee.

Our only purpose in bringing these matters to your attention is that your subcommittee may have them before it in its consideration of the wisdom and necessity of including the aforementioned supplemental appropriation in the proposed legislation. Should you decide that it is necessary to do so, despite our conviction that a judgment in the Emmet case will provide more adequate and appropriate relief to the veterans involved, we suggest that the follow-

ing language be added to the end of that part of the proposed legislation involving the aforementioned supplemental appropriation of \$1,300,000: "*Provided, further, That payment of such refunds shall be without prejudice to the payees' rights to receive the amount of interest, if any, finally determined to be due thereon to said payees in Emmet et al. v. Higley, Administrator of Veterans' Affairs et al. (Civil Action No. 5658-55, United States District Court for the District of Columbia): Provided further, That prior to making such refunds, the Veterans' Administration shall deduct therefrom the taxable costs, litigation expenses, and attorneys' fees, if any, finally determined to be payable therefrom in the aforementioned civil action, and shall pay over said amounts to the persons therein found to be entitled thereto.*"

In this connection, we wish to advise you that Messrs. White, Harber & Schei and Messrs. Tonnele & Bedford have received very nominal fees to date for the time that they have devoted to this litigation and we have received no fees whatsoever for our work and will receive none except such as the court may decree in the Emmet case. As shown in the enclosed memorandum of points and authorities, the authority of the district court, as a court of equity, to award taxable costs, litigation expenses, and attorneys' fees, is based upon the rule that where attorneys recover a fund for the benefit of their clients and others, those benefited thereby become obligated to pay the cost of the recovery and preservation of the fund, including reasonable attorneys' fees.

Respectfully submitted,

BUTLER, KOEHLER & TAUSIG,

By JOHN T. KOEHLER.

**Plaintiffs' Exhibit 6. Communication From Butler,
Koehler & Tausig**

H. R. 9369

85th CONGRESS - 1st SESSION

This Act would authorize the repayment of \$1,642,000 to 8,440 veterans of World War II, this sum representing monies illegally withheld from these veterans, in 1949 and 1950, by the Veterans' Administration. Our firm is one of the three law firms which have fought the Veterans' Administration for seven years to right the wrong done to these veterans. The Supreme Court of the United States agreed with us (*Plesha v. United States*, 352 U.S. 202) and *but for our success in opposing the Veterans' Administration, H. R. 9369 would never have been introduced and these veterans would never have recovered a penny of their losses.*

We urge the following amendments to the Act:

1. *H. R. 9369 would deny interest on the amounts withheld. The question of interest should not be foreclosed by legislation but should be left for determination by the court in pending litigation. Interest at 3% would amount to approximately \$350,000.*

2. *H.R. 9369 would authorize refunds in those cases only in which application is made to the Veterans' Administration within two years. Since the Veterans' Administration has a record of the name of each affected veteran and the amount illegally withheld from him, an application should not be a condition precedent to a refund, and there should not be a two year statute of limitations. Otherwise, those veterans or their estates who do not receive notice of this legislation would never be repaid.*

3. *H. R. 9369 makes no provision for withholding of the taxable costs, court expenses and counsel fees incurred during the seven years' litigation period. The Act should be amended to provide for immediate payment to the*

veterans of 90% of the amount involved and the withholding of 10%. From this amount of 10%, taxable costs, court expenses and *such counsel fees as the court may determine* would be paid. The lawyers involved in this matter have received no fees at all for the years of time and effort they and we have devoted to this litigation and, unless the suggested amendment is adopted, the possibility of ever securing any fees for representing persons who could not individually have retained lawyers will vanish.

Respectfully submitted,

BUTLER, KOEHLER & TAUSIG

By /s/ JOHN T. KOEHLER
John T. Koehler

Oral Decision in Consolidated Cases of Boldt. J., Delivered
October 22, 1958, in Transcript of Proceedings, pp. 270-275

THE COURT. Gentlemen, because of the temporary injunction now in effect in this Court, and for many other reasons, prompt and final disposition of this extensive and extended litigation is highly desirable. Several judges and courts have dealt with the subject-matter in one way or another, and a multitude of decisions have been cited pro and con on each of the many questions of law presented. In these circumstances modesty indicates that it is not likely that this particular judge could add anything of value by an extended or written exposition of the applicable law. I am in this dilemma: Either to say very little and deal only in ultimate conclusions, or I must take a very great deal of time to say a great deal. And if I were to follow the latter course, I doubt it would be of any persuasiveness to those of my superiors in the judicial hierarchy; so I feel it appropriate to follow the former. The few factual questions before the Court can be dealt with briefly and in ultimate terms. The period of my assignment in this district is nearing conclusion, and upon return to the Western District of

Washington I will be engaged immediately in the trial of a major and very protracted case, which for many weeks will prevent the preparation of a detailed, written decision in the present case. Finally, personally I feel as well or better able to decide the case at this time as I will be at any later time.

The briefs submitted have been carefully examined, and the lengthy and detailed arguments have been closely followed, with study of the authorities cited during the progress of the trial and incident to the argument. For all of these reasons I propose at this time to announce my views in broad and general terms.

Directly or by implication, District Judges Lemmon, Halbert, Dimock, Curran and Youngdahl have found and held this Court to have jurisdiction of each and all of the causes now before the Court. I concur in that view and, after full consideration, find all of the various contentions of the defendants challenging jurisdiction to be without merit.

Under the authorities, I am satisfied that a proceeding in the nature of mandamus for the relief sought in the Emmet case does lie, and I so hold.

There is little if any doubt but that plaintiffs' actions, at a minimum, fall within Rule 23(a)(3), and accordingly are so-called "spurious" class actions. While perhaps somewhat less certain, in my opinion the cases are "hybrid" class actions and fall within the conditions specified in Rule 23(a)(2). I so hold.

Whatever may have been thought of the matter prior to the decision of the Supreme Court in *Plesha versus United States*, it is now indisputable that the recovery of funds from veterans here involved and the withholding or offsetting of the National Service Life dividends and compensation benefits from plaintiffs and the 8400-odd similarly situated veterans was wrongful, unlawful and beyond the statutory power and authority of the defendant Adminis-

trator. However well intentioned or for that matter reasonable under the circumstances then existing, the recovery and withholding of these funds in effect was a misappropriation thereof; and the funds, at all times since they should have been distributed to the veterans, have been and now are the property of the veterans concerned. This being so, it seems to me that the letter and spirit of the National Service Life statute authorizes, if it does not require, the payment of three per cent interest on the funds during the period they were wrongfully withheld from the veterans. I find and hold that such recovery of interest should be provided for.

The final questions in the case pertain to the claims of the plaintiffs for allowance of fees to plaintiffs' attorneys. There cannot be the slightest doubt but that the services of counsel in the Plesha case, in the pending actions, and in all of the various extensive work directly and indirectly incident thereto have and will produce the ultimate recovery to be had by the veterans to be benefited by the services. Likewise there can be no reasonable doubt that these services were highly skilled, ingenious, persistent and effective. In short, they were legal services of the very highest order, and in my opinion but for those services the funds now to be returned to the servicemen, whose property they are, would not have been recovered by them. Thus in truth and in fact the funds were produced, or preserved, or restored—whichever term you wish to use, or all three—by the efforts and services of counsel.

Looking back to the period when these services began, and for most if not all of the period of the services, at least until the Plesha decision in the Supreme Court, the likelihood of recovery for the servicemen and the probability of earning and recovering fees in any amount for the great time and effort expended, each and both, must have appeared highly uncertain and speculative. Indeed Government counsel suggest that the clear preponderance of au-

thority was against any such likelihood. The remarkable devotion of counsel to the cause and to the veterans benefited thereby, with their determined and long-continued efforts to bring it to a successful conclusion, in spite of numerous obstacles of great magnitude, in my opinion is to be highly commended under recognized standards of professional practice. "The laborer is worthy of his hire." This principle applies to lawyers as well as to others who perform valuable services. Professional services then under these conditions deserve fair and substantial compensation, in keeping with the hazards involved, the services rendered, and the results produced thereby.

A five per cent fee, on the average stipulated individual recovery, would amount to about \$10 per veteran—to each serviceman a modest sum indeed. The total amount of such fee, while substantial, is well within the limits of fairness and reasonableness, especially considering the several learned and distinguished members of the bar entitled to participate therein. I find and hold that plaintiffs' counsel are entitled to an award of compensation from each and all of the individual veterans of the class entitled to recovery by reason of the services rendered, and that five per cent of the total awarded to each serviceman is a fair and reasonable sum to be allowed. Litigation expenses of every nature will first be reimbursed from the five per cent award, and the total balance shared by counsel for plaintiffs in these actions in such manner and amounts as counsel may themselves determine.

Findings, conclusions, judgment and decree in accordance with these views should be submitted at the very earliest convenience of counsel. I would like to suggest that work on drafting the same be undertaken forthwith, in order that you may present the matter to me within the next several days and have it settled and determined before I leave the District.

It is so ordered.

Findings of Fact and Conclusions of Law in the Consolidated Cases, Boldt, J., Filed November 7, 1958

In the above entitled cases, consolidated for trial and tried together, the Court, after hearing the evidence, considering the argument of counsel, and being fully advised in the premises, makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

The Court finds:

1. That approximately 8,440 veterans (including the named plaintiffs and intervenors herein) who entered the armed services of the United States prior to October 6, 1942, and whose policies of commercial life insurance were protected from lapse during their military service and for one year thereafter under and in accordance with Article IV of the Soldiers' and Sailors' Civil Relief Act of 1940, 50 U.S.C. App. 540-554, allowed said policies to lapse after separation from the armed services, whereupon the United States was called upon to pay and did pay, in discharge of its obligations under said Act, to the several insurers who had issued such commercial life insurance policies sums of money aggregating \$1,643,065.78; whether more than said sum was paid out is not shown by the record.
2. That said Act was amended, effective October 6, 1942, to provide, among other things, that the amount paid by the United States to an insurer on account of applications approved under the provisions of said Act, as amended, shall become a debt due to the United States by the insured on whose account payment was made.
3. That prior to the amendments of October 6, 1942, the Director of Insurance for the Veterans Administration and the Assistant Director publicly announced on four separate occasions that the Act did not impose on the persons whose life insurance policies were protected from lapse by said

Act any obligation to reimburse the United States for amounts which it might be required to expend on account of the protection of such policies.

4. That subsequently, in Administrator's Decisions Nos. 513, dated March 1, 1943, and 742 dated April 1, 1947, said Administrator of Veterans Affairs concluded that the United States was entitled to reimbursement for losses it sustained on account of the obligations it assumed under the said Act, prior to the amendment thereof in 1942.

5. That pursuant to such Decisions, said Administrator and the Comptroller General of the United States attempted to collect and did collect from the approximately 8,440 veterans hereinbefore mentioned the moneys which said Administrator claimed said veterans owed to the United States to reimburse it for the moneys previously paid to said insurers as aforesaid. That said collections were made by demand, by set-off against National Service Life Insurance special dividends, by set-off against disability compensation, by set-off against other gratuitous benefits awarded and payable pursuant to laws administered by the Veterans Administration and by suit.

6. That the total amount so collected was \$1,643,065.78, of which total \$592,547.52 were payments made in cash in response to demand therefor made by the Administrator of Veterans Affairs; \$962,048.83 was collected by way of set-off from special dividends on National Service Life Insurance policies; \$64,292.23 was collected by way of set-off from disability compensation; and \$24,177.20 was collected by way of set-off from awards of other gratuitous benefits and by suit.

7. That the sums so collected were deposited by said Administrator in the Soldiers' and Sailors' Civil Relief Fund. That some of the moneys so deposited in said Fund were paid by said Administrator pursuant to statutory authority, to insurers having claims under said Act.

That by the Supplemental Appropriations Act, 1953, approved March 28, 1953, 67 Stat. 16, and the Independent Offices Appropriations Act, 1955, approved June 24, 1954, 68 Stat. 292, \$1,500,000 in the Soldiers' and Sailors' Civil Relief Revolving Fund was carried to the surplus fund of the Treasury. That prior to August 27, 1958, when H.R. 13450, 85th Congress, 2d Sess., previously enacted, was signed and became P. L. 85-766, 72 Stat. 864, there was in the Soldiers' and Sailors' Civil Relief Fund approximately \$446,000.

8. That on January 14, 1957, the Supreme Court of the United States concluded, in *United States v. Plesha*, 352 U.S. 202 (which case was originally instituted in the Northern District of California, Northern Division) that the plaintiffs therein, Paul E. Plesha, James E. Mabbutt, and Myron L. Kern, were not obligated to reimburse the United States for moneys paid out on their behalf under Article IV of the Soldiers' and Sailors' Civil Relief Act of 1940, as originally enacted, and that they were entitled to recover their National Service Life Insurance special dividends which had been taken by the Administrator of Veterans Affairs by way of set-off. That the Plesha case was not a class action.

9. That *Emmet v. Whittier et al*, one of the three civil actions consolidated for trial before this Court, was brought by the plaintiff therein on his own behalf and on behalf of such of the aforementioned 8,440 veterans similarly situated to plaintiff, that is, those veterans from whom the Administrator of Veterans Affairs had taken National Service Life Insurance special dividends and disability compensation, because of his construction of the Soldiers' and Sailors' Civil Relief Act of 1940, as originally enacted, as specified in Paragraph 4 hereof, and by means of the set-offs specified in Paragraph 5 hereof. The main relief sought in said civil action is the recovery of said special dividends, with interest thereon, and the re-

covery of said disability compensation. That *Mabbutt v. United States of America* and *Deering v. United States of America*, the other two civil actions consolidated for trial before this Court, were brought by the plaintiffs therein on their own behalf and on behalf of such of the aforementioned veterans similarly situated to plaintiffs, that is, those veterans from whom the Administrator of Veterans Affairs had taken only National Service Life Insurance special dividends. The main relief sought in said civil actions is the recovery of said special dividends, with interest thereon. That the members of each of said classes number several thousand and are so numerous as to make it impracticable to bring them all before the court, and the plaintiffs and intervenors in each of these consolidated actions will fairly insure the adequate representation of all the members of each of the classes.

10. That the National Service Life Insurance Fund created by 38 U.S.C. 805 is a trust fund, and that the Administrator of Veterans Affairs and the Secretary of the Treasury are trustees thereof.

11. That under Section 802(e) of 38 U.S.C., all cash, loan, paid up and extended values, and all calculations in connection with National Service Life Insurance policies are based on the American Experience Table of Mortality and interest at the rate of 3 per centum per annum.

12. That moneys in said National Service Life Insurance Fund, including the aforementioned \$962,048.83 prior to its withdrawal by the Administrator as part of the special dividends payable to several thousand of said 8,440 veterans, were authorized to be invested and reinvested by the Secretary of the Treasury in interest-bearing obligations, and so far as policyholders were concerned such moneys, undistributed, should bear interest at the rate of 3 per centum per annum, as authorized by 38 U.S.C. 802(e) and 805.

13. That said Administrator declared special dividends in excess of \$962,048.83 in favor of those several thousand of the aforementioned 8,440 veterans who were National Service Life Insurance policyholders, and withdrew the same from the National Service Life Insurance Fund commencing the early part of 1950 for the declared purpose of paying such special dividends to the policyholders entitled thereto, but instead of paying such dividends over to them in full, exercised a claimed right of set-off against such dividends in the amount of \$962,048.83 for the purpose of reimbursing the United States as stated above.

14. That H.R. 9369 was enacted by the House and by the Senate and was signed by the President and on August 1, 1958, became P. L. 85-586, 72 Stat. 487. That said law authorizes the Administrator of Veterans Affairs to use the Soldiers' and Sailors' Civil Relief Fund "to make refunds, without interest, which are due on account of amounts collected by the United States Government by offset or otherwise from persons who made valid application for and were legally entitled to the protection of Article IV of the Soldiers' and Sailors' Civil Relief Act of 1940, as it existed prior to the amendments of October 6, 1942", provided that "No refund shall be made pursuant to this Act unless application therefor is made to the Veterans Administration, within two years after the date of enactment of this Act and refund hereunder shall not be denied by reason of any other statutory time limitations, judgments heretofore rendered or any other technical defense." That said Act also authorizes the appropriation of such additional sums as may be necessary to carry out the purposes of the Act. That H.R. 13450, 85th Congress, 2d Sess. was enacted and on August 27, 1958, was signed and became P. L. 85-766, 72 Stat. 864; therein Congress appropriated an additional \$1,300,000 to the Soldiers' and Sailors' Civil Relief Fund for the aforesaid purposes.

15. That on August 19, 1958, this Court issued a preliminary injunction in *Emmet v. Whittier et al*, Civil

Action No. 5658-55, restraining the defendant Sumner G. Whittier, the Administrator of Veterans Affairs "from refunding to any claimant more than 90% of the amount which Public Law 85-586 of the 85th Congress, Second Session authorizes the Administrator of Veterans Affairs to refund to said claimant.", and said injunction remains in full force and effect to date. That not until after the enactment of Public Law 85-586 and the issuance of the aforementioned preliminary injunction were any of said amounts totalling \$962,048.83 paid to any of the veterans entitled thereto. At the close of business on October 15, 1958, refunds totalling \$648,414.76 had been made to 3,068 veterans entitled thereto under the provisions of said Act and pursuant to the aforesaid injunction, the Administrator withheld \$72,044.38 from said veterans.

16. That Lawrence A. Schei is an attorney and a member of the law firm of White, Harber & Schei of Sacramento, California, and has represented and continues to represent Paul E. Plesha, James E. Mabbutt and Myron L. Kern in the Plesha case.

17. That Lawrence A. Schei also is the attorney for the plaintiffs, Robert H. Mabbutt and Robert R. Johnson, and all persons similarly situated, in Civil Action No. 1032-58, presently pending before this Court, said action having originally been filed in the District Court of the United States for the Northern District of California, Northern Division, as Civil Action No. 7341; that since the transfer of said action to the United States District Court for the District of Columbia, the law firm of Butler, Koehler & Tausig of Washington, D. C., has acted as local counsel for the plaintiffs therein.

18. That Nathaniel F. Bedford is an attorney and a member of the law firm of Jillson, Bedford & Hoppen of New York City and has represented and continues to represent Herman Hormel, Jr., plaintiff in Civil Action No. 62-312 in the United States District Court for the

Southern District of New York, which involved the same questions of law as were involved in the Plesha case; that said Nathaniel F. Bedford also represented Charles H. Stilson, Jr., an intervenor in said action. That said action was decided in favor of the plaintiffs therein by the United States District Court for the Southern District of New York, *Hormel v. United States*, 123 F. Supp. 806; that an appeal from the judgment entered in said action was taken by the United States, but by stipulation consideration of said appeal was withheld pending final determination of said Plesha case, and upon such final determination of said Plesha case, the appeal of the United States was dismissed, leaving the judgment of the United States District Court for the Southern District of New York a final judgment.

19. That Nathaniel F. Bedford also is the attorney for the plaintiff and all persons similarly situated in the case of *James A. Deering v. United States of America*, originally filed in the United States District Court for the Southern District of New York as Civil Action No. 106-52, and now by virtue of transfer to this district Civil Action No. 1018-58 in the United States District Court for the District of Columbia; that since the transfer of said case the law firm of Butler, Koehler & Tausig has been local counsel for said plaintiff.

20. That Henry F. Butler, John T. Koehler and John Geyer Tausig are attorneys and partners in said law firm of Butler, Koehler & Tausig. That said members of said firm are the attorneys for plaintiff Herman L. R. Emmet, Jr., and all persons similarly situated in Civil Action No. 5658-55 in this Court, which action is a mandamus action against Sumner G. Whittier, Administrator of Veterans Affairs, Robert B. Anderson, Secretary of the Treasury, Ivy Baker Priest, Treasurer of the United States, and Joseph Campbell, Comptroller General of the United States. That said firm are also attorneys for Willard Van

Valkenburgh and Alfred S. Moses, intervenors in said action, and are local counsel for intervenors Paul E. Plesha, James E. Mabbutt, Robert H. Mabbutt, Robert R. Johnson, Herman Hormel, Jr., Charles H. Stilson, Jr. and James A. Deering.

21. That Nathaniel F. Bedford and Lawrence A. Schei have collaborated in the prosecution of the aforementioned actions in which they have been involved since November 7, 1951, exchanging pleadings, briefs and the results of legal research and analysis done by each of them. That with the approval of Lawrence A. Schei, Nathaniel F. Bedford, in the Fall of 1954, brought the law firm of Butler, Koehler & Tausig into this litigation, which firm has since collaborated with said Nathaniel F. Bedford and said Lawrence A. Schei in the preparation and prosecution of the several actions above mentioned.

22. That but for the institution of the several class actions heretofore referred to, the rights of all similarly situated veterans, who were not named plaintiffs or intervenors in any of the aforementioned actions, to recover at law the amounts collected from them by set-off, as specified in Paragraphs 5 and 6 of these findings, would have been barred by the Statutes of Limitations contained in 38 U.S.C. 445 and 28 U.S.C. 2401 upon the expiration of six years from the time such collections were made.

23. That the aforementioned attorneys have devoted, in the aggregate, more than 2,400 hours of their time in the rendition of professional services directly or indirectly connected with and affecting the outcome of some or all of the aforementioned actions, including the time devoted to the presentation of the views of plaintiffs, intervenors, and all similarly situated veterans in the cases at bar and the point of view of their attorneys to the Congress of the United States during its consideration of H. R. 9369. That the services so rendered were highly skilled, ingenious, persistent, effective and rendered with remarkable devo-

tion to the cause and the veterans to be benefited thereby, in the face of numerous obstacles of great magnitude. That said attorneys and their clients have incurred substantial expenses exceeding \$2,900 in the prosecution of said actions, and in their appearances before Congress. That but for the rendition of all of said services, and the expenditure of such funds, the issues involved would not have been presented to the Supreme Court of the United States in the Plesha case, H.R. 9369 would not have been introduced in the 85th Congress, 1st Sess., and would not have been enacted into law as Public Law 85-586, 72 Stat. 487, and none of the veterans from whom collections were made, as specified in Paragraphs 5 and 6 herein, would have received refunds of the amounts thus collected or any interest thereon.

CONCLUSIONS OF LAW

The Court concludes:

1. That contrary to the Decisions of the Administrator of Veterans Affairs mentioned in paragraph 4 of the Findings of Fact herein, the Soldiers' and Sailors' Civil Relief Act of 1940, 50 U.S.C. App. 540-554, as it stood prior to its amendment on October 6, 1942, did not personally obligate former servicemen to reimburse the United States for its payment of premiums and interest on their commercial life insurance policies, which were protected against lapse under the terms and provisions of Article IV of said Act prior to said amendment. Therefore, the United States had no legal right to be reimbursed for said payments and in asserting such right the Administrator exceeded his statutory authority.

2. That insofar as said Administrator set-off National Service Life Insurance special dividends or set-off any benefits payable pursuant to any law administered by the Veterans Administration and relating to veterans, their estates, or their dependents, in order to collect the debts

which said Administrator asserted to have arisen as a result of the protection of commercial life insurance policies against lapse under the provisions of Article IV of the Soldiers' and Sailors' Civil Relief Act of 1940, as originally enacted, the Administrator exceeded his statutory authority. That the set-off of National Service Life Insurance special dividends was not only an illegal taking of the property of the plaintiffs and intervenors herein and all other veterans similarly situated, but also constituted a misappropriation of funds from the permanent trust known as the National Service Life Fund, by its trustees, the Administrator of Veterans Affairs and the Secretary of the Treasury.

3. That since the Administrator of Veterans Affairs declared that the plaintiffs and intervenors and all other similarly situated veterans involved in the three civil actions presently before this Court, were entitled to the National Service Life Insurance special dividends here involved (\$962,048.83) and withdrew said dividends from the National Service Life Insurance Fund, but without legal justification and as a result of the aforementioned set-off failed and refused to pay them over to said veterans, in legal contemplation such dividends remained in the National Service Life Insurance Fund and, therefore, under the provisions of the National Service Life Insurance Act, 38 U.S.C. 801 et seq. and the veterans' National Service Life Insurance contracts continued to be entitled to participate in all earnings of said Fund, including the right to bear 3% simple interest thereon from the date of their actual withdrawal therefrom to the date they have been or shall be paid to the veterans entitled thereto.

4. That the plaintiffs and intervenors in the Emmet case and plaintiffs in the Mabbutt and Deering cases, as well as the members of the classes represented in each of said civil actions, exhausted their administrative remedies before said actions were filed. That if any member of said

classes failed to make demand upon the Administrator for the payment of the National Service Life Insurance special dividends or for disability compensation which the Administrator wrongfully seized and withheld from him, that failure is not a bar to the maintenance of said civil actions, for equity does not require the doing of a useless thing. That the making of such a demand would have been futile is established by the Administrator's Decisions Nos. 513, dated March 1, 1943 and 742, dated April 1, 1947, by the fact that prior to the declaration of the National Service Life Insurance Special dividend of 1950 the Administrator made demands upon the members of the classes here involved for the money the United States had paid on their behalf under the provisions of Article IV of the Soldiers' and Sailors' Civil Relief Act of 1940, as originally enacted, and by the fact that after the Administrator wrongfully seized their National Service Life Insurance special dividends and disability compensation, said Administrator resisted the claims made for the return of said special dividends in the Plesha and Hormel cases. That in any event it was not necessary for the members of the classes to seek administrative redress before these three civil actions were commenced, because it is contended and established therein that the Administrator exceeded his statutory authority in seizing said special dividends and disability compensation.

5. That said National Service Life Insurance special dividends, as well as the disability compensation (\$64,292.23) taken by way of set-off from all veterans similarly situated to the plaintiff in the Emmet case, at all times remained the property of said veterans. That the fact that all of said property was placed in the Soldiers' and Sailors' Civil Relief Fund and some of it was subsequently transferred to the surplus of the Treasury of the United States and thereafter restored to the Soldiers' and Sailors' Civil Relief Fund, does not establish that the adjudication of the several claims of the plaintiffs, inter-

venors and members of the classes would not affect specific property involved in each of these consolidated actions, but to the contrary establishes that the adjudication of said several claims would involve specific property involved therein and, accordingly, that each of the consolidated actions is a "hybrid" class action and may be maintained under Rule 23(a)(2) of the Federal Rules of Civil Procedure.

6. That if the Emmet, Mabbutt and Deering cases cannot be maintained as class actions under the provisions of Rule 23(a)(2) of the Federal Rules of Civil Procedure, they can be maintained as "spurious" class actions under subdivision (3) of said Rule. That the Supreme Court's decision in the Plesha case did not settle a common question of law involved in said civil actions, to wit, the rights of the veterans involved therein to interest on the National Service Life Insurance special dividends withdrawn from the National Service Life Insurance Fund and illegally withheld from them.

7. That inasmuch as the Administrator of Veterans Affairs exceeded his statutory authority, as specified in paragraphs 1 and 2 of these Conclusions of Law, the United States of America is not an indispensable party-defendant in *Emmet v. Whittier, Administrator of Veterans Affairs, et al*, Civil Action No. 5658-55; and despite the fact that the ultimate object of said civil action is to compel the defendant-officers of the United States by mandatory injunction to pay moneys from the Treasury of the United States or with the Treasury Department, this Court has the power to grant such relief and the plaintiffs, intervenors and members of the class they represent are entitled thereto, because said moneys belong to and were unlawfully seized from them by the Administrator of Veterans Affairs and are illegally withheld from them under the exclusive control of the said defendants. That the due process clause of the Fifth Amendment to the Con-

stitution endows this Court with the aforesaid power, and the Administrative Procedure Act, 5 U.S.C. 1009, expressly provides for direct review of the action of a public officer to protect against arbitrary action by such an officer.

8. That insofar as the Emmet case involves a suit for recovery of disability compensation, this Court's jurisdiction over the same has not been withdrawn either by 28 U.S.C. 1346(d)(1) or by 38 U.S.C. 2211 (formerly 38 U.S.C. 11(a)(2) and 705). That said statutes do not withdraw said jurisdiction because they are not applicable to rights asserted by the Administrator of Veterans Affairs under the Soldiers' and Sailors' Civil Relief Act of 1940 against disability compensation which the veterans have been found to be entitled to by said Administrator.

9. That this Court has jurisdiction over *Mabbutt et al. v. United States of America*, Civil Action No. 1032-58, and *Deering v. United States of America*, Civil Action No. 1018-58, and the power to grant the relief sought therein, for inasmuch as the plaintiffs therein seek on their own behalf and on behalf of all other veterans similarly situated only a money judgment for the amount of their National Service Life Insurance special dividends and interest thereon, which the Administrator of Veterans Affairs illegally seized and withheld from them, said civil actions involve "disagreement as to claim, including claim for refund of premiums, under a contract of insurance between the Veterans' Administration and any person or persons claiming thereunder" within the meaning of 38 U.S.C. 445 and 817, and, therefore, said civil actions could have been instituted in the United States District Court for the District of Columbia, and, accordingly, were properly transferred to this district under the provisions of 28 U.S.C. 1404(a). That the plaintiffs therein and the members of the class they represent are entitled to the relief they seek in said civil actions.

10. That P. L. 85-586, 72 Stat. 487, as implemented by P. L. 85-766, 72 Stat. 864, does not give the plaintiff and

intervenor and members of the class represented in the Emmet case, or the plaintiffs and members of the class represented in the Mabbutt and Deering cases, the relief they seek and are entitled to in said civil actions with respect to the recovery of their National Service Life Insurance special dividends and disability compensation, which were illegally taken and withheld from them as aforesaid. That though they seek in said civil actions judgments for the immediate return to them of said special dividends and disability compensation, for which they applied and were found entitled to during or prior to 1950, P. L. 85-586, 72 Stat. 437, requires them to apply again for the refunds authorized therein within two years after the date of enactment of said Act.

11. That the enactment of P. L. 85-586, 72 Stat. 487, as implemented by P. L. 85-766, 72 Stat. 864, did not make any of these three civil actions moot, for the reason set forth in paragraph 10 of these Conclusions of Law, and for the further reason that said statutes do not dispose of the claims in said civil actions for interest on the illegally withheld National Service Life Insurance special dividends or dispose of the claim for an allowance of an attorneys fee.

12. That, although the plaintiff and intervenors in the Emmet case represent only several thousand veterans from whom the Administrator of Veterans Affairs illegally seized and withheld National Service Life Insurance special dividends and disability compensation and the plaintiffs in the Mabbutt and Deering cases represent a somewhat smaller but very substantial number of veterans from whom the Administrator of Veterans Affairs illegally seized and withheld National Service Life Insurance special dividends only, this Court, in the exercise of its equity powers, may award litigation expenses and fees to the attorneys for the plaintiffs and intervenors in said three consolidated actions, not only from the funds to be restored to the members of the

aforementioned classes, but also from the funds to be restored to those of the aforementioned 8,440 veterans from whom the Administrator of Veterans Affairs and Comptroller General made collections by demand and by offset from awards of other benefits and by suit. That this Court may make such award, because Paul E. Plesha and James E. Mabbutt have intervened in the Emmet case and in said intervention are represented by Lawrence A. Schei, Esq., the same attorney who represented and continues to represent them in the Plesha case; because Herman Hormel, Jr., and Charles H. Stilson, Jr., also have intervened in the Emmet case and in said intervention are represented by Nathaniel F. Bedford, Esq., the same attorney who represented and continues to represent them in the Hormel case; because but for the professional services rendered in the Plesha and Hormel cases and in the three consolidated actions presently before this Court, the Veterans Administration would not have sought legislation authorizing the Administrator of Veterans Affairs to refund any of the moneys collected in any manner from the 8,440 veterans whose commercial life insurance policies were protected against lapse under the provisions of Article IV of the Soldiers' and Sailors' Civil Relief Act of 1940, as originally enacted, H.R. 9369 would not have been introduced in the 85th Congress, 1st Sess., and would not have been enacted into law as Public Law 85-586, 72 Stat. 487, and those of the 8,440 veterans from whom collections were made by demand, by set-off against other benefits and by suit, would not have had such moneys restored to them. That the restrictions of 38 U.S.C. 3001(a) (formerly 38 U.S.C. 454a) were not intended to restrain courts of equity, when dealing with situations like that disclosed in this litigation, from awarding an attorneys fee from benefits due under any law administered by the Veterans Administration.

13. That in view of all the circumstances involved, including the hazards of all of the aforementioned litigation, the tremendous amount of time required to bring it to a

successful conclusion, the value of the fund restored to the 8,440 veterans, and the limitation imposed by 38 U.S.C. 551 on an award of an attorneys fee from the payment to be made under a judgment rendered in an action brought pursuant to 38 U.S.C. 445 and 817, the attorneys mentioned above are entitled to a fair and reasonable fee, and as of the date of the entry of these Conclusions of Law, such fair and reasonable fee is 5% of the total amount to be refunded to the 8,440 veterans, that is 5% of the principal sum of \$1,642,065.78 and 5% of the interest that is to be paid on \$962,048.83 thereof. That said attorneys fees should be pro-rated amongst each of the aforementioned 8,440 veterans, by deducting 5% of the amount each veteran becomes entitled to as a result of the judgments to be entered herein or has or will become entitled to under P. L. 85-586, 72 Stat. 487 and P. L. 85-766, 72 Stat. 864. That said attorneys fee is to be paid to Butler, Koehler & Tausig, who are to use said fee first to reimburse each plaintiff, intervenor and attorney involved in the Plesha and Hormel cases and in the consolidated cases at bar for litigation expenses of every nature he incurred therein, and who are thereafter to divide the balance of the fee between each of the attorneys mentioned above, in such manner and amounts as they may mutually agree.

14. That the preliminary injunction issued by the Court in the Emmet case on August 19, 1958 should remain in full force and effect until the judgments to be entered herein are fully satisfied or until further order of this Court.

Let judgment be entered accordingly
this day of October, 1958.

GEORGE H. BOLDT
Judge

Judgment. Boldt. J. Filed November 7. 1958

This action was consolidated for trial with *Mabbutt et al v. United States of America*, Civil Action No. 1032-58 and *Deering v. United States of America*, Civil Action No. 1018-58, tried before the Court sitting without a jury on October 20, 21 and 22, 1958, and after consideration of the evidence, the oral arguments by counsel for plaintiff and intervenors and counsel for defendants and after study of the points and authorities relied upon in the briefs submitted by counsel for the litigants, the Court rendered an Opinion and made Findings of Fact and Conclusions of Law in favor of the plaintiff, Herman L. R. Emmet, Jr., and the intervenors, Willard Van Valkenburgh, Alfred S. Moses, Jr., Paul E. Plesha, James E. Mabbutt, Robert H. Mabbutt, Robert R. Johnson, Herman Hormel, Jr., Charles H. Stilson and James A. Deering and in favor of each similarly situated veteran on whose behalf said plaintiff and intervenors brought and maintained this class action, and against the defendants, Sumner G. Whittier, Administrator of Veterans Affairs, Robert B. Anderson, Secretary of the Treasury of the United States, Ivy Baker Priest, Treasurer of the United States and Joseph Campbell, Comptroller General of the United States; now therefore, in accordance with said Opinion, Findings of Fact and Conclusions of Law, it is by the Court on this . . . day of October, 1958

ORDERED, ADJUDGED AND DECREED:

1. That the defendants are hereby enjoined to pay over to the plaintiff and to each intervenor herein and to each veteran similarly situated to said plaintiff a sum equal to that part of each of their respective National Service Life Insurance special dividends, which the Administrator of Veterans Affairs withdrew from the National Service Life Insurance Fund and failed to pay over to each of said veterans, by reason of the fact that said Administrator wrongfully applied the same to an alleged but non-existent indebtedness of each of said veterans, which said Adminis-

trator claimed to have arisen as the result of moneys expended by the United States of America in discharge of its obligation to protect the commercial life insurance policy or policies of each of said veterans from lapse as required by Article IV of the Soldiers' and Sailors' Civil Relief Act of 1940, as originally enacted.

2. That the defendants are hereby enjoined to pay over to the plaintiff and to each intervenor herein and to each veteran similarly situated to said plaintiff, interest at 3 per centum per annum on an amount equal to the value of the aforesaid National Service Life Insurance special dividends, from the date said special dividends were withdrawn from National Service Life Insurance Fund to the date said special dividends are paid to each of said veterans.

3. That the defendants are hereby enjoined to pay over to the plaintiff and to each intervenor herein and to each veteran similarly situated to the plaintiff that part of the disability compensation due each, which the Administrator of Veterans Affairs failed to pay over to each of said veterans, by reason of the fact that said Administrator wrongfully applied the same to an alleged but non-existent indebtedness of each of said veterans, which said Administrator claimed to have arisen as a result of moneys expended by the United States of America in discharge of its obligation to protect the commercial life insurance policies of each of said veterans from lapse, as required by Article IV of the Soldiers' and Sailors' Civil Relief Act of 1940, as originally enacted.

4. That an attorneys fee of 5 per cent on the aggregate amount of principal and interest which the defendants are enjoined to pay in paragraphs 1, 2 and 3 hereof is hereby allowed; and before paying said principal and interest over to each veteran entitled thereto, the defendants are enjoined to deduct 5 per cent therefrom and pay the same over to the law firm of Butler, Koehler & Tausig, 1039 Investment Building, Washington 5, D. C.

5. That an attorneys fee of 5 per cent is also allowed on the total principal sum to be refunded under the provision of Public Law 85-586, 72 Stat. 487, to veterans from whom the Administrator of Veterans Affairs collected, by means other than set-off against National Service Life Insurance special dividends and disability compensation, all or any part of the alleged but non-existent debt referred to in paragraphs 1 and 3 hereof; and the defendants are hereby enjoined to pay said attorneys fee by deducting forthwith 5 per cent of the refunds due or which may become due under said Public Law to each of the veterans specified in this paragraph and by paying over the same without further delay to the law firm of Butler, Koehler & Tausig, 1039 Investment Building, Washington 5, D. C.

6. That Butler, Koehler & Tausig shall use the attorneys fee allowed herein in paragraphs 4 and 5, first to reimburse each plaintiff, intervenor and attorney involved in the consolidated cases at bar, for litigation expenses of every nature he incurred in the prosecution thereof, and in the prosecution of *Plesha v. United States of America*, Civil Action No. 6326, in the United States District Court for the Northern District of California, Northern Division, and the appeals therefrom, and in the prosecution of *Hormel v. United States of America*, Civil Action No. 62-312, in the United States District Court for the Southern District of New York and the appeal therefrom; and Butler, Koehler & Tausig shall thereafter divide the balance of the fee between themselves, Nathaniel F. Bedford and Lawrence A. Schei, as they may mutually agree.

7. That this judgment is to be read in conjunction with judgments entered this date in *Mabbutt, et al v. United States of America*, Civil Action No. 1032-58, and in *Deering v. United States of America*, Civil Action No. 1018-58, which to some extent overlap this judgment, and each veteran is to be paid principal and interest due him only once, and the attorneys are to be allowed and paid 5

per cent of the aggregate amount of principal and interest authorized and directed to be returned to the veterans by said judgments or by legislation, only once.

8. That upon receipt by Butler, Koehler & Tausig of the attorneys fee allowed herein or in *Deering v. United States of America* or in *Mabbutt, et al v. United States of America*, Lawrence A. Schei is enjoined from seeking fees in the aforementioned Plesha case and Nathaniel F. Bedford is enjoined from seeking fees in the aforementioned Hormel case.

9. The preliminary injunction issued by this Court on August 19, 1958 enjoining the defendant, Sumner G. Whittier, Administrator of Veterans Affairs, "from refunding to any claimant more than 90% of the amount which Public Law 85-586 of the 85th Congress, Second Session, authorizes the Administrator of Veterans Affairs to refund to said claimant" is hereby continued in full force and effect until the judgment herein has been satisfied in full or until further order of this Court.

GEORGE H. BOLDT
Judge

Notice of Appeal. Filed January 5, 1959

Notice is hereby given this 5th day of January, 1959, that defendants hereby appeal to the United States Court of Appeals for the District of Columbia from the judgment of this Court entered on the 7th day of November, 1958 in favor of plaintiffs against said defendants.

/s/ OLIVER GASCH
Attorney for defendants.

OLIVER GASCH,
United States Attorney

RECORD IN DEERING NO. 15.067

Docket Entries

1958

Deposit for cost by Transferred from the S.Dist. Court
of New York,

Apr. 18 Complaint, appearance filed

Apr. 18 Summons, copies (-) and copies (-) of Com-
plaint issued

Docket entries of the Southern District Court of New
York filed to date:

1955 Dec. 30: Complaint and summons issued,

1956 Jan. 12: Summons & Return. Served Julius
Rolnitsky, U. S. Atty. 1-4-56,

Mar. 5: Answer of Deft. to complaint. App.
of Paul W. Williams, U.S. Atty. & Mathias
L. Spiegel, Asst. U. S. Atty.,

1958 Mar. 6: Affidavit and Notice of Motion for
Change of Venue—Ret. 3-13-58

Apr. 16: Opinion #24262, Motion for
Change of Venue to District of Columbia
is granted. So Ordered. Dimock, J.

Mailed notice of entry 4-17-58.

Apr. 16: Defendant's Affidavit in opposi-
tion to Change of Venue., filed.

1958

Apr. 18 Calendared (N)

Apr. 24 Motion of plttf. to consolidate 1018-58; 1032-58;
& 5658-55 for pretrial & trial, c/s 4-24-58; P&A; M.C.
4-24-58 filed

May 28 Order consolidating 5658-55, 1032-58 and 1018-58
for pretrial and trial (N) (Original filed in 5658-55)
Curran, J.

* * * * *

[Intervening docket entries, from June 19 to November
7 were in the consolidated proceedings and were the same
as in *Emmet*, *supra*, pp. 5-6.]

* * * * *

Nov. 7 Judgment for pltffs. vs. deft. for insurance and for
atty's. fees. Micro 11-10-58 Boldt, J. (N)

1959

Jan 5 Notice of appeal of deft. copy mailed to Butler,
Koehler & Tausig, Investment Building. filed

Complaint, Filed December 20, 1955

I. Jurisdiction is founded on provisions of Title 38, United States Code, Sections 817 and 445, Title 28, United States Code, Section 1346(a)(2) and 1402(a) and Rule 23, Federal Rules of Civil Procedure. Plaintiff is a resident of the Southern District of New York, residing at 25 East 67th Street, Borough of Manhattan, City, County and State of New York.

II. Plaintiff brings this action on behalf of himself and all other persons who are or have been members of the Armed Forces of the United States, whose lives were insured under a policy of National Service Life Insurance issued under the terms and provisions of Title 38, United States Code, Secs. 801 to 818 inclusive and/or whose lives were insured under and who were the owners and holders of and had an interest in a policy of commercial life insurance protected against lapse, under the terms and provisions of Article IV of the Soldiers' and Sailors' Civil Relief Act of 1940 (Act Oct. 17, 1940, c. 888, Secs. 400-415, 58 Stat.

1183; Title 50 Appendix, United States Code, Secs. 540 to 554 inclusive), and from whom the Veterans' Administration has collected, and/or against whose National Service Life Insurance dividends the Veterans' Administration has set off, any sums alleged to be due to the United States on account of the payment by the United States of any amounts alleged to be due upon termination of protection and lapse of any of said policies of commercial life insurance of said persons, which said policies were protected against lapse under the terms and provisions of said Article IV of said Soldiers' and Sailors' Civil Relief Act of 1940, similarly situated. The said persons similarly situated number, on information and belief, several thousand, the exact number being unknown to plaintiff, and it is therefore impracticable to bring them all before the Court. There are common questions of law and fact affecting the several rights of said persons as a class, and a common relief is sought.

III. Plaintiff is the owner of National Service Life Insurance policy No. V2 121 126 issued to him on or about February 25, 1942, effective on or about the same date, on which policy plaintiff has paid all premiums and which has since been in full force and effect until termination of the term thereof.

IV. Plaintiff for more than one month prior to his induction into the Army of the United States on or about January 29, 1942, was the owner of life insurance policy No. 5750807 issued by The Mutual Life Insurance Company of New York, which policy, upon application by plaintiff to The Mutual Life Insurance Company of New York on Veterans' Administration insurance form 380, was, upon approval by the Veterans' Administration, protected against lapse for non-payment of premiums by plaintiff under the terms and provisions of said Article IV of said Soldiers' and Sailors' Civil Relief Act of 1940.

V. Pursuant to an announcement by the Veterans' Administration that a special dividend, known as the "1948 Special Dividend," had been declared on policies of National Service Life Insurance, plaintiff duly filed an application for said special dividend and in the due course of events was advised by the Veterans' Administration that he was entitled to a dividend in the amount of \$401.50, but that on or about April 12, 1950, the Veterans' Administration had applied all of said dividend as a set-off to an alleged indebtedness to the United States in the amount of \$524.05 which was allegedly incurred through the payment by the United States of the amount certified by the Veterans' Administration to be due The Mutual Life Insurance Company of New York as an award under Section 406 of Article IV of the Soldiers' and Sailors' Civil Relief Act, as amended, on account of protection of said insurance policy No. 5750807 issued by said company, and that in or about September, 1951, plaintiff was further advised by the Veterans' Administration that it had further applied as a set-off to said alleged indebtedness to the United States further National Service Life Insurance dividends on said National Service Life Insurance Policy V2 121 126 in the amount of \$122.55.

VI. Plaintiff alleges that the protection afforded his said policy of commercial life insurance and those of other members of his class was pursuant to and under the terms and provisions of Article IV of the Soldiers' and Sailors' Relief Act of 1940 as originally enacted, and that under said terms and provisions neither he nor any member of the class for which he brings this action is indebted to the United States on account of any payment by the United States to any life insurance company on account of the protection against lapse under said Act of any of said commercial life insurance policies, and that the United States by the Veterans' Administration is unlawfully withholding funds due the plaintiff and other members of his class, has invested the

same, collected interest thereon, and is being unjustly enriched thereby.

VII. Plaintiff further alleges that he, and on information and belief others similarly situated, relied implicitly on the plain language and meaning of the Soldiers' and Sailors' Civil Relief Act of 1940 (Act Oct. 17, 1940; 54 Stat. 1185), on the wording of Veterans' Administration Insurance Forms 380 and 385, on the statements promulgated by officials of the Veterans' Administration purporting to interpret said Act of which plaintiff had knowledge prior to applying for the benefits of said Act, on the acts of commission, omission and equivocation and the representations and general conduct of the Veterans' Administration and its officials which, prior to the time plaintiff permitted his policy of commercial life insurance to lapse in reliance thereon, were all inconsistent with or misleading as to the claim subsequently asserted against plaintiff, whereby plaintiff and other members of his class would be damaged by permitting the United States to retain said funds offset or collected against such alleged indebtedness, and the United States should be estopped by its inconsistent and misleading conduct from so doing.

VIII. Plaintiff alleges that, even if the United States should be entitled to some reimbursements from plaintiff and others similarly situated under the terms and provisions of the original Article IV of the Soldiers' and Sailors' Civil Relief Act of 1940, plaintiff and others similarly situated have been overcharged and their rights under the Fifth Amendment to the Constitution of the United States infringed by deprivation of their property without due process of law or just compensation, by taking from plaintiff and others similarly situated an amount equal to the amount paid to the commercial insurance companies pursuant to said Article IV (Act Oct. 6, 1942; 56 Stat. 773), *with interest at 5% or more compounded annually* instead of an amount equal to the amount payable to the commercial

insurance companies pursuant to the original Soldiers' and Sailors' Civil Relief Act of 1940 (Act Oct. 17, 1940; 54 Stat. 1183) *with 3% simple interest.*

IX. Plaintiff has protested to defendant against this unauthorized offset, but defendant has refused to pay to plaintiff his National Service Life Insurance dividends, has, on information and belief, made similar unauthorized offsets and/or collections from and has likewise dealt with other members of the class to which plaintiff belongs, and, on information and belief, the sole remaining recourse of plaintiff and other members of this class is to this Court.

WHEREFORE plaintiff demands judgment, as follows:

1. That judgment to plaintiff against defendant be rendered in the amount of Five hundred twenty-four and 05/100 dollars (\$524.05), with interest on \$401.50 and One hundred twenty-two and 55/100 (\$122.55) respectively, from the date payment was due, at the average rate earned by the National Service Life Insurance Fund (38 U.S.C.A. Sec. 805) or the interest rate set on retained dividends by the Administrator of Veterans' Affairs, which ever is greater.

2. That judgment for members of plaintiff's class against defendant be granted for so much of the amounts due them and each of them as dividends on their National Service Life Insurance policies, plus interest thereon, as have been unlawfully withheld, and/or such amounts as have been unlawfully collected by defendant under mistake of law as to the nature of the obligation arising under the terms and provisions of Article IV of the Soldiers' and Sailors' Civil Relief Act of 1940 by defendant as offsets and/or claims to any indebtedness alleged to be due to the United States on account of payment of premiums and interest on commercial life insurance policies by the Veterans' Administration under the terms of the provisions of Article IV of the Soldiers' and Sailors' Civil Relief Act of 1940, or, in the alternative.

3. That defendant be ordered to notify all other members of plaintiff's class, to whom defendant by its Veterans' Administration sent out form letters misrepresenting their liabilities under the original Soldiers' and Sailors' Civil Relief Act of 1940, of the decision of this Court in this matter and of their opportunity to join in this action to assert their rights, or at least make known to plaintiff the names and addresses of such other persons similarly situated in order that plaintiff may notify them in such manner as the Court shall approve.

4. That if the Court find for plaintiff in this matter, without finding simultaneously for all members of plaintiff's class similarly situated, entry of judgment be stayed until a reasonable time after all members of plaintiff's class similarly situated have been notified of their opportunity to intervene, or else have been paid by defendant.

5. That defendant pay to plaintiff the costs and disbursements of this action.

6. That plaintiff and other members of his class may have such other and further relief as to the Court may seem just and proper.

Dated: December 29, 1955.

NATHANIEL F. BEDFORD
Attorney for Plaintiff
20 Pine Street
Borough of Manhattan
New York 5, N. Y.

Answer of United States, Filed March 5, 1956

The defendant, United States of America, by its attorney, PAUL W. WILLIAMS, United States Attorney for the Southern District of New York, in answer to the complaint, upon information and belief:

1. Admits the allegations contained in paragraphs III and IV, of the complaint.

2. Denies the allegations contained in paragraph I of the complaint, except admits plaintiff is a resident of the Southern District of New York, residing at 25 East 67th Street, City, County and State of New York.

3. Denies the allegations contained in paragraphs V and IX of the complaint except that the alleged indebtedness to the United States allegedly incurred through payment by the United States of the amount certified by the Veterans' Administration to be due The Mutual Life Insurance Company of New York on account of protection of insurance policy no. 5750807, was discharged by application (offset) of National Service Life Insurance dividends thereto, in the amount of \$524.05, payable with respect to the plaintiff's National Service Life Insurance policy V-2-121-126 (N-1-451-765), and defendant has refused to pay to plaintiff those dividends applied as an offset.

4. Denies each and every other allegation contained in the complaint.

AS AND FOR A FIRST SEPARATE AND COMPLETE DEFENSE:

5. The Court is without jurisdiction of the subject of the action and without jurisdiction to grant the relief prayed for in the complaint.

AS AND FOR A SECOND SEPARATE AND COMPLETE DEFENSE:

6. The complaint fails to state a claim against defendant upon which relief can be granted.

WHEREFORE, defendant, United States of America, demands judgment dismissing this complaint, together with its lawful costs and disbursements.

Dated: New York, N. Y., February 29, 1956.

PAUL W. WILLIAMS
*United States Attorney for the
 Southern District of New York
 Attorney for Defendant.*
 Office & P. O. Address:
 United States Court House
 Foley Square
 New York 7, N. Y.

By:
 MATTHIAS L. SPIEGEL
*Assistant United States
 Attorney*

Notice of Motion for Change of Venue, Filed March 6, 1958

Plaintiff moves the court to transfer this action to the United States District Court for the District of Columbia, pursuant to Section 1404(a), Title 28, United States Code, for the convenience of parties and witnesses, in the interest of justice, in that, as more clearly appears in the affidavits of NATHANIEL F. BEDFORD, JOHN GEYER TAUSIG and LAWRENCE A. SCHEL, hereto annexed as Exhibit A, Exhibit B and Exhibit C, respectively:

(a) This action was brought under 38 U. S. C. A., Section 817, governing suits in event of disagreement as to claims of National Service Life Insurance, and Section 445, governing such actions on claims; under these sections of the law it could have been brought in the United States District Court for the District of Columbia.

(b) The principal witnesses in this case are officials and employees of the United States, whose offices are all located in the District of Columbia. The same officials are the parties defendant in the action of *Herman L. R. Emmet, Jr., on behalf of himself and all others similarly situated, etc. v. Harvey V. Higley, Administrator of Veterans Affairs, George Magoffin Humphrey, Secretary of the Treasury of the United States, Ivy Baker Priest, Treasurer of the United States, and Joseph Campbell, Comptroller General of the United States*, Defendants, Civil Action No. 5658-55, which action is presently pending in the United States District Court for the District of Columbia.

(c) It was the wrongful acts of the defendants in *Herman L. R. Emmet, Jr., on behalf of himself and all others similarly situated, etc. v. Harvey V. Higley, Administrator of Veterans Affairs, et al.*, and their predecessors in office, that gave rise to the cause of action in the instant case, and this Court does not have jurisdiction *in personam* against these individuals.

(d) The rights of the class represented by plaintiff in this action can better be protected in the United States District Court for the District of Columbia, where the Court has personal jurisdiction over the Government officials and employees involved.

(e) The expense of bringing in said witnesses, all of them being present or former government officials or employees, to the City of New York, a distance of over 200 miles, for attendance upon trial of this action, will be great and will entail loss of time on the part of said witnesses.

(f) Upon the trial of this action it will be necessary for the Court to interpret and rule upon a number of applicable administrative decisions of the Veterans Administration, an agency of the United States Government with its headquarters in the City of Washington, District of Columbia.

(g) The moneys for which plaintiff herein sues are actually trust moneys from the National Service Life Insurance Fund, removed therefrom without his consent and, under the decision of the United States Supreme Court in *United States v. Plesha*, 352 U.S. 202, appear to have been misappropriated by the Administrator of Veterans Affairs. These moneys and the moneys of others similarly situated are all located in the District of Columbia, and are subject to the jurisdiction of the United States District Court for the District of Columbia.

(h) The transfer of this action to the District of Columbia for consolidation for trial with *Emmet, etc. v. Higley, et al.*, will save the time of this Court, bring about a prompt and final disposition of all pending litigation on this subject matter, best protect the interests of all members of the class on behalf of whom this action was commenced, and effect a result in the interest of the convenience of parties and witnesses, and in the interest of justice.

NATHANIEL F. BEDFORD
Attorney for Plaintiff,
 Office & P. O. Address:
 No. 68 William Street,
 Borough of Manhattan,
 New York 5, New York.

Memorandum Granting Motion for Change of Venue.
 Dimock J., Filed April 16, 1958

Dimock, D. J.

Plaintiff moves for a change of venue to the United States District Court for the District of Columbia pursuant to section 1404(a) of title 28 United States Code. That section allows a district court, for the convenience of parties and witnesses, in the interest of justice, to trans-

fer any civil action to any other district or division "where it might have been brought". A fundamental question is thus whether this action could have been brought in the District of Columbia.

The action is one to recover amounts of National Service Life Insurance dividends alleged to have been withheld by the government. These amounts are said to have been withheld on the theory that plaintiff owed like amounts to the government because the government had paid a like total to the Mutual Life Insurance Company of New York for plaintiff's account pursuant to the governmental protection of servicemen's life insurance prescribed by the insurance sections of the Soldiers' and Sailors' Civil Relief Act of 1940 and its amendment in 1942. Oct. 17, 1940, c. 888, §§ 400-414, 54 Stat. 1183, 50 U.S.C. App. old §§ 540-554; Oct. 6, 1942, c. 581, § 13, 56 Stat. 773, 50 U.S.C. App. §§ 540-548.

Section 1346(a) of title 28 U.S. Code authorizes contract suits against the United States but section 1402(a) provides that any action under it "may be presented only in the judicial district where the plaintiff resides". Plaintiff here resides in New York so that, if section 1346(a) is the only authority for this action, it cannot be transferred to the District of Columbia.

In *Hormel v. United States*, D.C.S.D.N.Y., 123 F. Supp. 806, I held that a similar action was authorized by section 1346(a) and found it unnecessary to decide whether it was also authorized by sections 817 and 445 of title 38 U.S. Code,* which do not limit the venue of actions thereunder to the district of the residence of the plaintiff. In *Plesha v. United States*, D.C.N.D. Cal.N.D., 123 F. Supp. 593,**

* Aug. 1, 1946, ch. 728, § 14, 60 Stat. 788; July 3, 1930, ch. 849, § 4, 46 Stat. 992.

** Reversed on other grounds 227 F. 2d 624, aff'd. 352 U.S. 202.

however, District Judge Lemmon refused to follow *Candell v. United States*, 10 Cir., 189 F. 2d 442, and held that an action like the present was authorized by section 817 of title 38. That section authorizes suit on any "claim" arising under the subchapter and section 445 defines "claim" as "any writing . . . which uses words showing an intention to claim insurance benefits". The Candell case had held that dividends were not "insurance benefits" but Judge Lemmon pointed to a reference in section 45a of title 38, to "overpayments of dividends, refunds, loans, or other insurance benefits." Though this section was enacted later than section 445, it is persuasive as an example of legislative use of the expression "insurance benefits" to include dividends. I therefore agree with Judge Lemmon and Judge Halbert who followed him in *Mabbutt v. United States of America*, referred to *infra*, that the statute contemplates the classification of dividends as insurance benefits and that suit to recover dividends is consequently authorized by section 817.

Once the power to transfer the case to the District of Columbia is found, the transfer follows almost as a matter of course. A similar suit originally brought there, *Emmet v. Higley*, Civil Action No. 5658-55, is pending and one brought in the District Court for the Northern District of California, Northern Division, *Mabbutt v. United States of America*, Civ. No. 7341, has just been transferred by Judge Halbert to the District of Columbia with memorandum dated April 3, 1958. Counsel in each of these cases has filed an affidavit here in support of the transfer of the instant case to the District of Columbia. In all three the plaintiffs sue on behalf of themselves and all other similarly situated. Plaintiffs hope that a fund will be created for all of that group and that all who are benefited may be required to share in the expense of the litigation. The convenience of the government will be served by having the whole litigation at its doorstep. Indeed I can think of no one but the moving plaintiff who

could have any valid ground for objection to trial in the District of Columbia.

The motion is granted.

So ordered.

Dated: April 16, 1958

S/ E. J. DIMOCK
United States District Judge

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[For proceedings in the consolidated cases in the District of Columbia see pp. 80-161, *supra*.]

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Judgment, Filed November 7, 1958

This action was consolidated for trial with *Emmet v. Whittier, et al*, Civil Action No. 5658-55, and *Mabbutt et al v. United States of America*, Civil Action No. 1032-58 and tried before the Court sitting without a jury on October 20, 21 and 22, 1958; and after consideration of the evidence and the oral argument of counsel for plaintiff and defendant, and after study of the points and authorities relied upon in the briefs submitted by counsel for the litigants, the Court rendered an Opinion and made Findings of Fact and Conclusions of Law in favor of the plaintiff James A. Deering, and in favor of each similarly situated veteran on whose behalf said plaintiff brought this class action, and against the defendant, the United States of America; now, therefore, in accordance with said Opinion, Findings of Fact and Conclusions of Law, it is by the Court this — day of October, 1958

ORDERED, ADJUDGED AND DECREED:

1. That the plaintiff, James A. Deering and each veteran similarly situated to said plaintiff, severally recover of the

United States of America a sum equal to that part of each of their respective National Service Life Insurance special dividends, which the Administrator of Veterans Affairs withdrew from the National Service Life Insurance Fund and failed to pay over to each of said veterans, by reason of the fact that said Administrator wrongfully applied the same to an alleged but non-existent indebtedness to the United States of each of said veterans, which said Administrator claimed to have arisen as a result of moneys expended by the United States of America in discharge of its obligation to protect the commercial life insurance policy or policies of each of said veterans from lapse, as required by Article IV of the Soldiers' and Sailors' Civil Relief Act of 1940, as originally enacted.

2. That the plaintiff James A. Deering and each veteran similarly situated to said plaintiff, severally recover of the United States of America an amount equal to simple interest at 3 per centum per annum on the aforesaid National Service Life Insurance special dividends, from the date said special dividends were withdrawn from the National Service Life Insurance Fund to the date said special dividends are paid to each of said veterans.

3. That an attorneys fee of 5 per cent on the aggregate amount of the judgment for principal and interest specified in paragraphs 1 and 2 hereof is hereby allowed; and before paying said principal and interest over to each veteran entitled thereto, the United States of America shall deduct 5 per cent therefrom and pay the same over to the law firm of Butler, Koeler & Tausig, 1039 Investment Building, Washington 5, D. C.

4. That an attorneys fee of 5 per cent is also allowed on the principal sum to be refunded under the provisions of Public Law 85-586, 72 Stat. 487, to each veteran from whom the Administrator of Veterans Affairs collected, by means other than set-off against National Service Life

Insurance special dividends, all or any part of the alleged but non-existent debt referred to in paragraph 1 hereof; and the United States of America shall pay said attorneys fee by deducting forthwith 5 per cent of the refunds due or which may become due under said Public Law to each of the veterans specified in this paragraph and by paying over the same without further delay to the law firm of Butler, Koehler & Tausig, 1039 Investment Building, Washington 5, D. C.

5. That Butler, Koehler & Tausig, shall use the attorneys fee allowed herein in paragraphs 3 and 4, first to reimburse each plaintiff, intervenor and attorney involved in the consolidated cases at bar, for litigation expenses of every nature incurred by each in the prosecution thereof, and in the prosecution of *Plesha v. United States of America*, Civil Action No. 6326 in the United States District Court for the Northern District of California, Northern Division, and the appeals therefrom and in the prosecution of *Hormel v. United States of America*, Civil Action No. 62-312 in the United States District Court for the Southern District of New York and the appeals therefrom; and Butler, Koehler & Tausig, shall thereafter divide the balance of the fee among themselves, and Nathaniel F. Bedford and Lawrence A. Schei as they may mutually agree.

6. That this judgment is to be read in conjunction with judgments entered on this date in *Mabbutt et al v. United States of America*, Civil Action No. 1032-58, and in *Emmet v. Whittier, et al*, Civil Action No. 5658-55, which to some extent overlap this judgment, and each veteran is to be paid principal and interest due him only once, and the attorneys are to be allowed and paid 5 per cent of the aggregate amount of principal and interest authorized and directed to be returned to the veterans by said judgments or by legislation, only once.

GEORGE H. BOLDT
Judge

Notice of Appeal. Filed January 5, 1959

Notice is hereby given this 5th day of January, 1959, that defendants hereby appeal to the United States Court of Appeals for the District of Columbia from the judgment of this Court entered on the 7th day of November, 1958 in favor of plaintiffs against said defendants.

/s/ OLIVER GASCH
Attorney for defendants.

OLIVER GASCH,
United States Attorney.

Send copy to:

Butler, Koehler & Tausig, Esqs.
1039 Investment Building
Washington 5, D. C.

RECORD IN MABBUTT, NO. 15,068

Docket Entries

- 1958 Deposit for cost by Transferred from the N. Dist.
 of California
- Apr. 21—Complaint, appearance, filed.
- Apr. 21—Summons, copies (—) and copies (—) of Complaint issued.
- Apr. 21—Docket entries of the United States District Court for the N. Dist. of California filed to date:
- 1956 Jan. 13: Complaint, issued summons,
 Jan. 19: Summons on ret. ex., 1-18-56,
 Jan. 24: Return on service of writ,
 Dec. 19: Request for default. Entered the default of the Defendant U. S., Filed notice of Motion to set cause for hearing,
- 1958 Jan. 6: Ord. case con. to Feb. 3rd, 1958, for hearing,
 Jan. 31: Answer of Deft. U. S., App. of Lloyd H. Burke, U. S. Atty., Robert E. Woodward, Asst. U. S. Atty., Placed on ready to set calendar. Mailed notices.
 Feb. 3: Ordered that motion to set for hearing on default be set aside.
 Feb. 19: Notice of motion for Change of Venue,
 Mar. 3: Ord. Motion for Change of Venue briefed in 10 days and 5 days, then to be submitted.
 Affidavit of Nathaniel F. Bedford,
 Mar. 13: Memo. of Deft. in opposition to Motion for Change of Venue.
 Affidavit of Robert E. Woodward in opposition of Motion for Change of Venue,
 Mar. 19: Pltf's. memo. in support of Change of Venue,

Apr. 3: Ord. Motion for Change of Venue,
Granted, Halbert, J. Memorandum and
Order. Mailed copies,

Apr. 14: Order for transfer, Made CERTIFICATE
TO TRANSFER, filed.

Apr. 21—Calendared (N).

Apr. 24—Motion of plttf. to consolidate 1032-58 & 1018-58
& 5658-55 for pre-trial & trial; c/s 4-24-58; P&A; M.C.
4-24-58, filed.

May 28—Order consolidating 5658-55, 1032-58 and 1018-58
for pretrial and trial (N) (original filed in 5658-55)
Curran, J.

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[Intervening docket entries, from June 19 to November 7
were in the consolidated proceedings and were the same
as in *Emmet, supra*, pp. 5-6.]

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Nov. 7—Judgment for plttfs. vs. defft. for insurance and for
attys fees. Micro 11-10-58 Boldt, J. (N).

1959

Jan. 5—Notice of appeal of defft., copy mailed to Butler
Koehler & Taussig, Investment Building. filed

Complaint, Filed January 13, 1956

I

That this action arises under the Act of October 8, 1940,
sometimes known as the National Service Life Insurance
Act of 1940, 54 Stat. 1008-1014, Title 38, U.S.C.A., Sections
801 to 818, as hereinafter more fully appears.

II

That this action also arises under Title 28 U.S.C. Section
1346, sometimes known as the Tucker Act, as hereinafter
more fully appears.

III

That Plaintiffs ROBERT H. MABBUTT and ROBERT R. JOHNSON are residents of the County of Sacramento, State of California, which is within the Northern Division of the Northern District of California; that some of the persons similarly situated reside within said District, and some reside elsewhere in the United States.

IV

That Plaintiffs bring this action for themselves and for all persons similarly situated; that as hereinafter more fully appears a large number of persons have claims against Defendant involving common questions of law and involving common factual backgrounds; that such common questions of law and fact affect the several rights of plaintiffs and of all of such other persons similarly situated; that according to plaintiffs information and belief more than 100 persons residing within the Northern District of California and substantially more than 1,000 persons residing in the United States of America have similar claims; that the amount of the claim of each such person is relatively small, the average claim according to plaintiffs information and belief being less than \$400.00; that such persons so situated are so numerous that it would be impractical to bring them all before this Court; that injustice to such persons will result unless their rights are protected in this action; that the rights of such persons can be adequately protected and represented in this action; that a common relief is sought in this action by and for plaintiffs and all such persons similarly situated.

V

That Plaintiffs, and each of them, and each of the persons similarly situated on whose behalf this suit is brought became members of the Armed Forces of the United States prior to October 6, 1942, and actively served therein prior to October 6, 1942.

VI

That each of plaintiffs and each of such persons similarly situated, was the owner, during his military service of one or more policies of life insurance issued by defendant under the said National Service Life Insurance Act.

VII

That in accordance with 38 U.S.C.A. Section 802(f) and Regulations issued pursuant thereto by the Administrator of Veterans' Affairs, a special dividend was declared by said Administrator to be paid for the surplus in the National Service Life Insurance Fund to each holder of a policy issued under said National Service Life Insurance Act prior to the year 1948 who should file claim for such dividend with said Administrator; that said Administrator publicly announced, in June, 1949, that said special dividend would be paid.

VIII

That each of plaintiffs and each of said persons similarly situated made timely claim on the form provided by said Administrator for such purpose, for all moneys due to him on account of dividends or special dividends payable on his said policy of life insurance.

IX

That upon filing his said claim Plaintiff ROBERT H. MABBUTT became entitled to receive a special dividend on his said policy in the amount of approximately \$366.00; that upon filing his said claim Plaintiff ROBERT R. JOHNSON became entitled to receive a special dividend on his said policy in the amount of \$258.50; that the amount of the special dividend to which each of the other persons similarly situated became entitled upon filing his claim is unknown to plaintiffs, but that the amount of each of such dividends is capable of being precisely ascertained from records in defendant's possession; that payment of such

dividends to all persons entitled thereto commenced January 16, 1950.

X

That defendant did not pay to plaintiffs, or any of them, or to any of said persons similarly situated, the full amount of his said special dividend, but made deductions, varying in amount, from the dividend owing to each of said persons; that the amount so deducted from the special dividend of Plaintiff ROBERT H. MABBUTT was \$205.96, leaving a balance of approximately \$160.00, which said balance was paid to him by defendant; that the amount so deducted from the special dividend of Plaintiff, ROBERT R. JOHNSON was \$160.95, leaving a balance of \$97.55, which said balance was paid to him by defendant; that plaintiffs do not know the exact amount deducted from said dividends owing to each of the other persons similarly situated but that the amount of each such deduction is capable of being precisely ascertained from records in defendant's possession; that all of said deductions were made after January 15, 1950.

XI

That each of said deductions was based on the assertion by defendant of a claimed right of set-off for moneys said by defendant to be owing to defendant by the plaintiff or other person from whose dividend the deduction was made; that in each case such claim of indebtedness to defendant was based on the fact that defendant had paid out an equal amount on account of obligations assumed by defendant in connection with the protection, under Article IV of the Soldiers' and Sailors' Civil Relief Act of 1940 (54 Stat. 1183-1186), of life insurance on the life of the particular plaintiff or other person from whose dividend such deduction was made; that in each case application for the protection of such life insurance was duly and regularly made in accordance with the provisions of said Soldiers and Sailors Civil Relief Act of 1940 prior to the amendment of said Act on October 6, 1942.

XII

That there is a disagreement as to the claim of each of plaintiffs and each of said other persons for such special dividend within the meaning of Title 38 U.S.C.A. Section 817.

XIII

That there is now due, owing and payable to Plaintiff ROBERT H. MABBUTT by defendant the sum of \$205.96; that there is now due, owing and payable to Plaintiff ROBERT R. JOHNSON by defendant the sum of \$160.95; that there is now due, owing and unpaid to each of said other persons similarly situated a sum of money equal to the amount deducted from his said special dividend, as aforesaid; that in addition interest is owing on each of the amounts so due from the date such deduction was made, at the legal rate.

WHEREFORE, Plaintiffs pray judgment against defendant as follows:

1. For Plaintiff ROBERT H. MABBUTT, the sum of \$205.96, plus interest thereon from the date such deduction was made, and his costs of suit;
2. For Plaintiff ROBERT R. JOHNSON, the sum of \$160.95, plus interest thereon from the date such deduction was made, and his costs of suit;
3. For each of the persons similarly situated, a sum equal to the amount deducted from his said special dividend, as aforesaid, plus interest thereon from the date such deduction was made.

WHITE, HARBER & SCHEI
by /s/ LAWRENCE A. SCHEI
Attorneys for Plaintiffs.

Answer of United States. Filed January 31, 1958

Defendant in answering plaintiffs' Complaint admits, denies and alleges as follows:

FIRST DEFENSE

That the Complaint fails to state a claim against the defendant upon which relief can be granted.

SECOND DEFENSE

That the Court is without jurisdiction to hear and determine this cause of action.

THIRD DEFENSE

That there is no disagreement between the plaintiffs and the Veterans Administration with respect to the dividends payable under their policy of National Service Life Insurance which may be made the basis for the assumption by the Court of jurisdiction of this suit under Sections 801 to 818 of Title 28, United States Code, or under the provisions of Title 28 United States Code, Section 1346.

FOURTH DEFENSE

That plaintiffs are not entitled to interest since the Court is without jurisdiction and because interest may not be recovered against the United States in the absence of express statutory or contract provision therefor.

FIFTH DEFENSE

That plaintiffs are not entitled to costs as the Court has no jurisdiction and this action being in substance one which seeks relief against the sovereign costs may not be recovered.

SIXTH DEFENSE

That there are no common questions of law and fact set forth in plaintiffs' Complaint which would give rise to a

"class action"; maintainable herein by plaintiffs designated as "All Persons Similarly Situated."

SEVENTH DEFENSE

For answer to the allegations in the several paragraphs of plaintiffs' Complaint the defendant says:

I

It is denied that this action is maintainable under the sections of law set forth in paragraphs I and II of plaintiffs' Complaint.

II

Admits that part of paragraph III that plaintiffs ROBERT H. MABBUTT and ROBERT R. JOHNSON are residents of Sacramento, which is within the Northern Division of the Northern District of California, but denies all other allegations of said paragraph III.

III

The allegations of paragraph IV are denied.

IV

Defendant admits that part of paragraph V which alleges that ROBERT H. MABBUTT and ROBERT R. JOHNSON became members of the Armed Forces of the United States and actively served prior to October 6, 1942, but denies all other allegations of paragraph V.

V

Defendant admits that part of paragraph VI which alleges that ROBERT H. MABBUTT and ROBERT R. JOHNSON were owners of one or more policies of life insurance issued under the National Service Life Insurance Act, but denies all other allegations of paragraph VI.

VI

The allegations of paragraph VII are admitted.

VII

Defendant admits that part of paragraph VIII that ROBERT H. MABBUTT and ROBERT R. JOHNSON made timely claim to the Administrator for all money due them on account of dividends payable on their said policies of life insurance, but denies all other allegations of paragraph VIII.

VIII

The allegations of paragraph IX are denied. Further answering the defendant says that plaintiff ROBERT H. MABBUTT became entitled to a special dividend on his said policy in the amount of approximately \$366.00 and that plaintiff ROBERT R. JOHNSON upon filing his claim became entitled to receive a special dividend on his said policy in the amount of \$258.50.

IX

The allegations of paragraph X are denied. Further answering the defendant says that from the special dividend of plaintiff ROBERT H. MABBUTT the amount of \$205.96 was deducted leaving a balance of approximately \$160.00 which was paid to him by defendant and that the amount deducted from the special dividend of plaintiff ROBERT R. JOHNSON was \$160.95, leaving a balance of \$97.55 which was paid to him by defendant.

X

The allegations of paragraphs XI and XII are denied.

XI

Answering the allegations contained in paragraph XIII defendant admits that there is now due, owing and payable to plaintiff ROBERT H. MABBUTT the sum of \$205.96, and that there is now due, owing and payable to plaintiff ROBERT R.

JOHNSON the sum of \$160.95, but denies all other allegations in paragraph XIII.

WHEREFORE, defendant prays that judgment be entered as follows:

1. That plaintiff ROBERT H. MABBUTT be awarded the sum of \$205.96 without interest or costs.
2. That plaintiff ROBERT R. JOHNSON be awarded the sum of \$160.95 without interest or costs.
3. That all other plaintiffs take nothing by this action.
4. For such other and further relief as may to the Court seem just and proper.

LLOYD H. BURKE
United States Attorney

By ROBERT E. WOODWARD
Robert E. Woodward
Assistant U. S. Attorney
Attorneys for Defendant

Plaintiffs' Notice of Motion for Change of Venue.
Filed February 19, 1958

Please take notice that on Monday, the 3rd day of March, 1958, at the hour of 10:00 o'clock A.M., or as soon thereafter as counsel can be heard, in courtroom No. 1 of the above entitled court in the Federal Building in the City of Sacramento, California, located at 8th and I Streets, in said city, plaintiff will move said court to transfer this action to the United States District Court for the District of Columbia, pursuant to Section 1404 (a), Title 28, United States Code, for the convenience of parties and witnesses, in the interest of justice. This motion is based on the facts set forth in the affidavits of JOHN GEYER TAUSIG and LAWRENCE A. SCHEL, hereto annexed as Exhibit A and

Exhibit B, respectively, and upon the reasons and grounds more particularly stated in said affidavits.

LAWRENCE A. SCHEI
Attorney for Plaintiffs
503 Bank of America Building
Sacramento, California

**Memorandum and Order, Halbert, J., Directing Transfer of
Action to the District of Columbia, Filed April 3, 1958**

Plaintiffs, herein, have moved to transfer the above entitled action to the United States District Court for the District of Columbia, pursuant to Title 28 U.S.C.A. § 1404(a). This motion is resisted by the defendant on the theory that this Court has sole jurisdiction of the case by virtue of Title 28 U.S.C.A. § 1346 which, together with Title 28 U.S.C.A. § 1402(a), restricts the venue of plaintiff's cause to this Court. Defendant points out that before a change of venue is proper, the action must be such as could originally have been brought in the transferee court (Title 28 U.S.C.A. § 1404(a)). This rule is not disputed, but other law makes it inapplicable to this case.

If this case could have been legally instituted in the District Court for the District of Columbia, then it is within my discretion to determine whether this case shall remain here for trial or be sent to the District of Columbia for trial pursuant to plaintiffs' motion (*Hopson v. Hopson*, 221 F. 2d 839; *Dufek v. Roux Distributing Co.*, 125 F. Supp. 716; *United States v. E. I. du Pont De Nemours and Co.*, 83 F. Supp. 233; and *United States v. National City Lines*, 80 F. Supp. 734). While there is authority to the contrary (See: *Candell v. United States*, 189 F. 2d 442), I believe that the law on this subject was correctly stated by my predecessor on this Bench, the Honorable Dal M. Lemmon, in *Plesha v. United States*, 123 F. Supp. 593.¹ In what I

¹ I am fully aware of the fact that this case was reversed (227 F. 2d 376, affirmed 352 U.S. 202), but it was reversed on grounds other than the rule that I am adopting for the purpose of this decision.

believe to be a well considered and soundly reasoned opinion, Judge Lemmon reached the conclusion in the *Plesha* case that Title 38 U.S.C.A. §§ 817 and 845, make it legally possible to bring such a suit as the instant one in either the District in which the plaintiff resides, or in the District of Columbia (See also *Hormel v. United States*, 11 F.R.D. 376).

Having reached the above legal conclusion, the sole remaining problem to be resolved is whether I should exercise the discretion allowed me in this case, and sent it to the District Court for the District of Columbia for trial. To me the determining factor is that the plaintiffs, who reside here in this District, and have local counsel, are the ones who are making the motion. They believe that their rights can best be preserved by having this case tried in the District Court for the District of Columbia. This is their decision, and I do not feel any moral obligation, or conceive that I have an legal right, to "save them" from their own considered judgment.

What then of the defendant? How the defendant can be injured by having the matter transferred to the District Court for the District of Columbia is not clear to me. The District of Columbia is the principal seat of the government of the defendant; that is, the home base for all its governmental operations. It has become standard practice for counsel for the defendant in districts at some distance from the District of Columbia to "check with Washington" before giving an unequivocal answer to any legal problem of consequence. Under these conditions, I cannot see how the defendant can possibly be harmed by having this case sent for trial in its own bailiwick. Quite to the contrary, it appears to me from the record in this case that the convenience of the parties, the convenience of the witnesses, and the interests of justice, preponderate in favor of the case being heard by the District Court for the District of Columbia. Accordingly, such an order will be made.

IT IS, THEREFORE, ORDERED that plaintiffs' motion for the transfer of this action from this Court to the United States District Court for the District of Columbia, pursuant to § 1404(a), Title 28 U.S.C.A., for the convenience of the parties and witnesses, and in the interest of justice, be, and the same is, hereby granted;

IT IS FURTHER ORDERED that plaintiffs prepare and lodge with the Clerk of this Court a formal order in accordance with the Court's ruling on plaintiffs' motion, as above set forth;

AND IT IS FURTHER ORDERED that the Clerk of this Court be, and he is, hereby authorized, empowered and directed to do all that may be required of him in order to satisfy and fulfill the requirements of this order and any other order entered pursuant to it.

DATED: April 3, 1958.

SHERILL HALBERT
United States District Judge

Order of Transfer, Halbert, J., Filed April 21, 1958

Plaintiffs having moved for an order transferring the venue of this case to the United States District Court for the District of Columbia, and said motion having duly come on to be heard on the 3rd day of March, 1958, and the court having heard the argument of counsel and having considered briefs submitted by them, and the court being fully advised, and it appearing to the court that Plaintiff's motion should be granted for the convenience of parties and witnesses and in the interests of justice, it is

ORDERED that this action be transferred from the United States District Court for the Northern District of California, Northern Division, to the United States District Court for the District of Columbia; and it is further

ORDERED that the Clerk of this United States District Court for the Northern District of California, Northern Division, be and he is hereby directed to transfer all records and papers in this action to the Clerk of the United States District Court for the District of Columbia, together with a certified copy of this order.

DATED: April 11th, 1958

/s/ SHERRILL HALBERT
United States District Judge

* * * * *

[For proceedings in the consolidated cases in the District of Columbia, see pp. 80-161, *supra*.]

* * * * *

Judgment. Boldt, J.. Filed November 7, 1958

This action was consolidated for trial with *Emmet v. Whittier, et al.*, Civil Action No. 5658-55 and *Deering v. United States of America*, Civil Action No. 1018-58 and tried before this Court sitting without a jury on October 20, 21 and 22, 1958; and after consideration of the evidence and the oral argument of counsel for plaintiffs and defendant, and after study of the points and authorities relied upon in the briefs submitted by counsel for the litigants, the Court rendered an Opinion and made Findings of Fact and Conclusions of Law in favor of the plaintiffs, Robert H. Mabbutt and Robert R. Johnson, and in favor of each similarly situated veteran on whose behalf said plaintiffs brought this class action, and against the defendant, the United States of America; now, therefore, in accordance with said Opinion, Findings of Fact and Conclusions of Law, it is by the Court on this day of October, 1958

ORDERED, ADJUDGED AND DECREED:

1. That the plaintiffs, Robert H. Mabbutt and Robert R. Johnson and each veteran similarly situated to said plain-

tiffs, severally recover of the United States of America a sum equal to that part of each of their respective National Service Life Insurance special dividends, which the Administrator of Veterans Affairs withdrew from the National Service Life Insurance Fund and failed to pay over to each of said veterans, by reason of the fact that said Administrator wrongfully applied the same to an alleged but non-existent indebtedness to the United States of each of said veterans, which said Administrator claimed to have arisen as the result of moneys expended by the United States of America in discharge of its obligation to protect the commercial life insurance policy or policies of each of said veterans from lapse, as required by Article IV of the Soldiers' and Sailors' Civil Relief Act of 1940, as originally enacted.

2. That the plaintiffs, Robert H. Mabbutt and Robert R. Johnson and each veteran similarly situated to said plaintiffs, severally recover of the United States of America simple interest in an amount equal to 3 per centum per annum on the aforesaid National Service Life Insurance special dividends, from the date said special dividends were withdrawn from the National Service Life Insurance Fund to the date said special dividends are paid to each of said veterans.

3. That an attorneys fee of 5 per cent on the aggregate amount of the judgment for principal and interest specified in paragraphs 1 and 2 hereof is hereby allowed; and before paying said principal and interest over to each veteran entitled thereto, the United States of America shall deduct 5 per cent therefrom and pay the same over to the law firm of Butler, Koehler & Tausig, 1039 Investment Building, Washington 5, D. C.

4. That an attorneys fee of 5 per cent is also allowed on the principal sum to be refunded under the provisions of P. L. 85-586, 72 Stat. 487, to each veteran from whom the Administrator of Veterans Affairs collected by means

other than set-off against National Service Life Insurance special dividends, all or any part of the alleged but non-existent debt referred to in paragraph 1 hereof; and the United States of America shall pay said attorneys fee by deducting forthwith 5 per cent of the refunds due or which may become due under said Public Law to each of the veterans specified in this paragraph and by paying over the same without further delay to the law firm of Butler, Koehler & Tausig, 1039 Investment Building, Washington 5, D. C.

5. That Butler, Koehler & Tausig shall use the attorneys fee allowed herein in paragraphs 3 and 4, first to reimburse each plaintiff, intervenor and attorney involved in the consolidated cases at bar, for litigation expenses of every nature incurred by each in the prosecution thereof, and in the prosecution of *Plesha v. United States of America*, Civil Action No. 6326, in the United States District Court for the Northern District of California, Northern Division, and the appeals therefrom, and in the prosecution of *Hormel v. United States of America*, Civil Action No. 62-312 in the United States District Court for the Southern District of New York and the appeal therefrom; and Butler, Koehler & Tausig shall thereafter divide the balance of the fee among themselves and Nathaniel F. Bedford and Lawrence A. Schei as they may mutually agree.

6. That this judgment is to be read in conjunction with judgments entered on this date in *Deering v. United States of America*, Civil Action No. 1018-58, and in *Emmet v. Whittier, et al.*, Civil Action No. 5658-55, which to some extent overlap this judgment, and each veteran is to be paid principal and interest due him only once, and the attorneys are to be allowed and paid 5 per cent of the aggregate amount of principal and interest authorized and directed to be returned to the veterans by said judgments or by legislation only once.

GEORGE H. BOLDT
Judge

Defendant's Notice of Appeal. Filed January 5, 1959

Notice is hereby given this 5th day of January, 1959, that defendants hereby appeal to the United States Court of Appeals for the District of Columbia from the judgment of this Court entered on the 7th day of November, 1958. in favor of plaintiffs against said defendants

/s/ OLIVER GASCH
Attorney for defendants

OLIVER GASCH,
United States Attorney